Petition

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NO. 81-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

AMERICAN COMMERICAL LINES, INC.
Petitioner

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION
Respondents

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS
Petitioners

v.

LAWRENCE A. SARAUW
Respondent

SILVER BULK SHIPPING, LTD.
Petitioner

v.

WILLIAM MC CARTHY
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a rule of law promulgated by this Court has thrice been disregarded or circumvented by a court of appeals in favor of its own contrary rule, is it not incumbent on this Court to reinforce its ruling by vacating the judgments of the court of appeals?

2. Where a vessel owner's liability for a condition which might pose an unreasonable risk of harm to a longshoreman was decided prior to this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. ____, 101 S. Ct. 1614 (1981), and pursuant to a standard of care specifically rejected by Scindia, is not the vessel owner entitled to have its liability reevaluated under the proper Scindia standard?

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OPINIONS BELOW

Petitioners are the vessel owners[1] in three cases remanded by this Court to the United States Court of Appeals for the Third Circuit for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. ____, 101 S. Ct. 1614 (1981). The remand Orders

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1. In compliance with Rules 21.1(b) and 28.1, corporate petitioners certify that the captions of the cases in this Court contain the names of all parties and submit the following listing: Den Shipping Co., Ltd. is the parent company of petitioner, Silver Bulk Shipping, Ltd.; Silver Line Ltd. and Denholm Ship Management are affiliated companies of petitioner, Silver Bulk Shipping Ltd.; petitioner, Oceanic Navigation Corp. is not a publicly held corporation and there is no corporation which has a relationship to it as a parent, subsidiary or affiliate which is a publicly held corporation; Texas Gas Transmission Corp., a publicly held corporation, is the parent company of petitioner, American Commercial Lines, Inc. and there is no other corporation which has a relationship to American Commercial Lines, Inc. as a parent, subsidiary or affiliate which is a publicly held corporation.

of this Court dated May 4, 1981 are set forth in the Appendix at 35, 37, and 39. Petitioners are filing this single joint petition pursuant to Rule 19.4 because the cases involve identical or closely related questions.

The opinion of the United States Court of Appeals for the Third Circuit in Griffith v. Wheeling- Pittsburgh Steel Corp. from which review is sought is not yet reported but is set forth in the Appendix at 1. The prior Third Circuit opinion in Griffith (hereinafter Griffith I) which was vacated by this Court on May 4, 1981 is reported at 610 F.2d 116 and is set forth in the Appendix at 41. The opinion of the United States District Court for the Western District of Pennsylvania in Griffith is reported at 452 F. Supp. 841 and is set forth in the Appendix at 127.

The opinion of the United States Court of Appeals for the Third Circuit in Sarauw v. Oceanic Navigation Corp. from which review is sought is reported at 655 F.2d 526 and is set forth in the Appendix at 18. The prior Third Circuit opinion in Sarauw which was vacated by this Court on May 4, 1981 is reported at 622 F.2d 1168 and is set forth in the Appendix at 101. The opinion of the District Court of the Virgin Islands in Sarauw is not reported but is set forth in the Appendix at 203.

The opinion of the United States Court of Appeals for the Third Circuit in McCarthy v. Silver Bulk Shipping, Ltd. from which review is sought is not yet reported but is set forth in the Appendix at 13. The prior judgment order of the Third Circuit which was vacated by this

Court on May 4, 1981 is set forth in the Appendix at 99. The opinion of the United States District Court for the Eastern District of Pennsylvania in McCarthy is reported at 487 F. Supp. 1021 and is set forth in the Appendix at 158.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254 (1) to review judgments of the United States Court of Appeals for the Third Circuit. In Sarauw v. Oceanic Navigation Corp., the judgment was dated and entered on July 31, 1981 and is set forth in the Appendix at 238. In Griffith v. Wheeling-Pittsburgh Steel Corp., the judgment was dated and entered on August 11, 1981 and is set forth in the Appendix at 234. An order denying rehearing was dated and entered on September 11, 1981 and is set forth in the Appendix at 236. In McCarthy v. Silver Bulk Shipping, Ltd., the judgment was dated and entered on October 20, 1981 and is set forth in the Appendix at 232.

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. § 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall

be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

American Commerical Lines,
Inc., Petitioner
v. Thomas W. Griffith and
Wheeling-Pittsburgh
Steel Corp., Respondents

Respondent, Griffith, commenced his action to recover damages for injuries sustained while unloading a barge owned by American Commercial Lines, Inc., (American), and in the possession of Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh) his employer. Jurisdiction of the district court was based on 28 U.S.C. 1333.

Three days before Griffith's accident American's barge had been delivered to Wheeling-Pittsburgh and incorporated into its coal fleet. When the Wheeling-Pittsburgh stevedoring gang began to load the barge it became apparent that its hatch covers were difficult to move. After

some loading had been accomplished, the stevedoring foreman directed that the covers be closed.

In order to close a cover that had become stuck, a cable from a crane located on the sea wall was attached to the stuck cover and a second cable was attached to a second cover for leverage. Griffith and a co-worker stood on top of one of the covers while tension was applied.[2] The cover was raised by the crane operator before Griffith was able to reach a place of safety and he was precipitated into the hold.

The covers of American's barge were

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2. The district court stated that it was necessary to attach the hook in this way because eyelets on the stuck cover were missing. However, eyelets were only missing in the sense that the barge was not built with eyelets in the center of the covers. The eyelets were located at the quarter points of the ends of the covers and were all present.

designed to be lifted by cables attached to eyelets on the covers and stacked at the end of the barge if they were difficult to roll. Wheeling-Pittsburgh had previously used this lifting method when it encountered a cover which was difficult to roll. However, American knew that Wheeling-Pittsburgh sometimes used the "double cable method" that caused Griffith's accident. The district court made no findings concerning the frequency of use of either method or American's knowledge of the method being used at the time of the accident.

The district court found that American's negligence was fifty percent causative of the accident, Wheeling-Pittsburgh's negligence in its non-stevedoring capacity was twenty-five percent causative and Wheeling-Pittsburgh's negligence as stevedore was twenty-five percent causative. The Third Circuit affirmed the

judgment against American and vacated and remanded the case for further findings on Wheeling-Pittsburgh's status as an owner pro hac vice. (App 41).

On May 4, 1981 this Court granted a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, vacated the Third Circuit's judgment dated and entered on August 24, 1979 and ordered the case remanded to the Third Circuit for further consideration in light of Scindia Steam Navigation Co v. De Los Santos, 451 U.S. ____, 101 S. Ct. 1614 (1981).

On remand, the Third Circuit reiterated the standard of care it enunciated in Griffith I and held that it was still applicable notwithstanding Scindia. Accordingly, the Third Circuit reinstated its August 24, 1979 judgment. Petitioner

requests this Court to review the correctness of the Third Circuit's ruling on remand.

Oceanic Navigation Corp. and VLCC ANDROS ATLAS, Petitioners v. Lawrence A. Sarauw, Respondent

Respondent, Sarauw, brought his lawsuit against Petitioners, Oceanic Navigation Corporation (hereinafter "Oceanic") and VLCC[3] ANDROS ATLAS in the District Court of the Virgin Islands, Division of St. Croix. Sarauw claimed damages from Oceanic as a result of personal injuries he sustained on November 15, 1977, when a gangway furnished by his employer, Hess Oil Virgin Islands Corporation (hereinafter "Hess"), for ingress to and egress from Oceanic's tanker, the ANDROS ATLAS,

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3. VLCC is an abbreviation for Very Large Crude Carrier.

fell while he was ascending it. Sarauw's claim against Oceanic is governed by 33 U.S.C. §905(b). Jurisdiction in the District Court of the Virgin Islands was pursurant to 48 U.S.C. §1612.

The ANDROS ATLAS arrived alongside the Hess Terminal's No. 3 dock at St. Croix, U.S. Virgin Islands, at 7:20 p.m. on November 14, 1977, to discharge a full cargo of crude oil. Because of the manner in which the dock was constructed, Hess required the ANDROS ATLAS, and all other tankers discharging at its St. Croix terminal, to use gangways owned and supplied by Hess. The limited dock space, encumbered by discharge hoses and booms, made it virtually impossible for vessels to deploy their own gangways. After berthing of the ANDROS ATLAS by Hess pilots and tugs, Hess dock employees placed into position and secured to the vessel Hess' short, lower gangway which

rested on the dock itself. The placement was accomplished by Hess employees using a crane located on the dock tower, which supported and provided access to the long, upper gangway also owned by Hess.[4] The securing of the shipboard end of the lower gangway was done by Hess employees with chains and ropes owned and supplied by Hess. After the placement and securing of the lower gangway, Hess employees, including Sarauw (who was a dock helper), monitored it to determine the point in the discharge of crude oil when the lower gangway was no longer safe due to the sharp angle created

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4. The lower gangway, dock tower and under side of the upper gangway are shown on a photograph identified as Plaintiff's Exhibit No. 6 at trial and reproduced in the Appendix at 273. In this Exhibit, the lower gangway is to the right of the tower and the underside of the upper gangway is shown at the top right hand section of the tower. To utilize the upper gangway, one has to ascend the stairs on the tower.

as the ANDROS ATLAS rose in the water. At this juncture, the upper gangway, secured to a platform on the tower, was to be extended over the vessel and made fast to the vessel. The lower gangway then had to be removed as the vessel continued to rise in the water.

Sarauw was at the No. 3 dock at 11:00 p.m. on November 14, 1977 and, until his accident shortly after 2:30 a.m. on November 15, 1977, was the only Hess employee at the dock or aboard the vessel. In the course of monitoring the lower gangway and otherwise performing his job for Hess, Sarauw used the lower gangway to board the ANDROS ATLAS on two separate occasions prior to his accident to advise the vessel to stop, and later to resume, discharge of oil. These orders from ashore were recorded in the vessel's log at 12:25 a.m. and 1:35 a.m. At about 2:30 a.m., Sarauw made the

determination that the lower gangway had to be replaced with the upper gangway on the tower. After moving the upper gangway over the vessel's side with the crane, Sarauw noticed the vessel's chain railings in place where he wanted to position the gangway, and when no crewmember responded to his call, he went down to the dock and started up the lower gangway to remove the vessel's railing. As he ascended the lower gangway, it fell from the vessel's side because the chains and ropes previously securing it had been removed. Sarauw denied that he had removed them. He also testified that he had not noticed if the chains and ropes were in place on the two prior occasions he used the gangway within two hours of the accident. There was uncontradicted evidence that the gangway was originally secured and also that the Master of the ANDROS ATLAS saw it secured when he used

it during the night. There was no evidence offered of any kind as to who removed the chains and ropes or when they were removed.

The case was submitted to the jury pursuant to the district court's instructions that Oceanic's duty to Sarauw was that set forth in §§ 343 and 343A of the Restatement (Second) of Torts. The jury found that Oceanic's negligence proximately caused Sarauw's accident. Additionally, the jury found that Sarauw's own negligence and the negligence of Hess were proximate causes of the accident to the extent of 25 percent each. The district court entered judgment in Sarauw's favor for the amount of the jury verdict reduced by the 50 percent negligence attributable to Sarauw and Hess. Both Sarauw's and Oceanic's post-trial motions were denied by the district court.

On appeal pursuant to 28 U.S.C. §1291, the United States Court of Appeals for the Third Circuit vacated the district court's judgment with instructions to enter a new judgment restoring the deduction made by the district court for the stevedore's negligence. In all other respects, the district court's judgment was affirmed. (App. 101). On May 4, 1981 this Court granted a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, vacated the Third Circuit's judgment dated and entered on May 20, 1980 and ordered the case remanded to the Third Circuit for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. ___, 101 S. Ct. 1614 (1981). On remand, the Third Circuit concluded that the rules enunciated in Scindia did not govern Sarauw. Accordingly, the Third Circuit reinstated its May 20, 1980 judgment.

Petitioners request this Court to review the correctness of the Third Circuit's ruling on remand.

Silver Bulk Shipping, Ltd., Petitioner v. William McCarthy, Respondent

Respondent, McCarthy, brought his action in the United States District Court for the Eastern District of Pennsylvania against Petitioner, Silver Bulk Shipping, Ltd., (hereinafter "Silver Bulk") to recover damages for personal injuries sustained on board Petitioner's vessel, M/V SILVERTWEED. McCarthy claimed damages resulting from an accident on January 6, 1977, which occurred while he was discharging a cargo of sugar from M/V SILVERTWEED in the course of his employment as a longshoreman with Amstar Corp. This action is governed by the Longshoremen's & Harbor Workers' Compensation Act, Section 5(b) as amended, 33

U.S.C. §905(b). Jurisdiction in the United States District Court for the Eastern District of Pennsylvania was pursuant to 28 U.S.C. §1332.

The M/V SILVERTWEED arrived at the Amstar Corp. pier in Philadelphia, Pennsylvania on December 24, 1976, laden with a cargo of bulk raw sugar from two Australian ports. On December 27, 1976, longshoremen employed by Amstar, including McCarthy, commenced discharging the bulk sugar out of the vessel's forward hatches according to a procedure established by Amstar and without any consultation with or participation by vessel personnel. Indeed, the collective bargaining agreement governing McCarthy's employment precluded participation by vessel personnel in the discharging operation.

The first step in the procedure was to position the large clam shell bucket

of an Amstar owned and operated floating crane over the hatch opening or "square" of the hatch being discharged. Then, the bucket was lowered into the hold where it picked up sugar from the center of the hatch. The loaded bucket was then removed from the hold and the sugar deposited on the pier. This continued until a large "V" had been created in the sugar, the vertex of which was located approximately fifteen to eighteen feet below the underside of the hatch coaming.

The second step consisted of lowering bulldozers into the hatch. With these, sugar was pulled from the wings (outer parts) of the hold and deposited into the "V", thereby creating a nearly even surface of sugar six to ten feet below the underside of the hatch coaming.

In the third step, longshoremen physically removed sugar from the sides of the bulkheads, beams and framing

("ribs") which could not be reached by the bulldozers. Thereupon, the clam shell bucket again was lowered into the hold, a new "V" was created and the three step procedure repeated until the cargo was completely discharged.

The hatch in which McCarthy's accident occurred was first opened on December 29, 1976. At that time, it was discovered that part of the bulk sugar had become wet as a result of leakage of sea water into the hatch. Petitioner concedes that this leakage stemmed from its improper maintenance of the hatch covers. Due to the moistened condition of the sugar which, in turn, resulted in part of it becoming frozen in the seasonal temperatures, the Amstar longshoremen were paid "distress rates", or double the normal hourly rate, for discharging this "noxious" or "distressing" cargo.

During the discharging, McCarthy worked as a "trimmer" or "cleaner" with responsibility for removing all sugar from the ribs during the third step of each discharge cycle. Specifically, McCarthy was assigned to work the after offshore area of the hatch.

During the first cycle, when the sugar surface was six to ten feet below the underside of the hatch coaming, McCarthy used a short scraper with a six foot handle and a long scraper with a ten to twelve foot handle to remove the sugar. The short scraper was used to dislodge sugar from about three feet over his head and the long scraper was used to dislodge sugar between the overhead beams. During the second cycle, the highest sugar in the ribs was four to five feet over his head. Accordingly, McCarthy used the long scraper to dislodge the sugar so as not to be under it when

it fell. Apart from the short and long handled scrapers, no other hand or power tools were used by the longshoremen to dislodge the hardened sugar.

McCarthy's accident occurred as he was preparing to trim at the end of the third cycle. At that time the surface of the sugar had been lowered to a depth of thirty to thirty-five feet below the underside of the hatch coaming. As he was about to commence scraping the sugar lodged in the after offshore area to which he had been assigned, McCarthy was hit on the head by a large piece of caked sugar that fell from an area which had been accessible to him during the first or second cycle but which he had not removed.

The case was submitted to the jury on Special Interrogatories after the district court ruled that the presence or absence of negligent conduct on the part

of Amstar was not relevant to Silver Bulk's liability to McCarthy, and that evidence of Amstar's duty of care, including applicable OSHA Safety and Health Standards for Longshoring, 29 CFR §1918, was inadmissible. Based on the jury's answers to the Special Interrogatories, judgment was entered for McCarthy. Silver Bulk's post trial motions were denied by the district court and the Court of Appeals for the Third Circuit affirmed without opinion by Judgment Order dated December 12, 1980.

On May 4, 1981, this Court granted a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, vacated the Third Circuit's judgment dated December 12, 1980 and ordered the case remanded to the Third Circuit for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. ____, 101 S. Ct. 1614 (1981).

On remand, the Third Circuit concluded that Scindia did not affect this case and reinstated its December 12, 1980 judgment. Petitioner requests this Court to review the correctness of the Third Circuit's ruling on remand.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. AMONG THE COURTS OF APPEALS ORDERED BY THIS COURT TO FURTHER CONSIDER DECISIONS IN LONGSHOREMEN PERSONAL INJURY ACTIONS AGAINST VESSEL OWNERS IN LIGHT OF SCINDIA STEAM NAVIGATION CO. v. DE LOS SANTOS, 451 U.S. ____, 101 S.Ct. 1614 (1981), THE COURT OF APPEALS FOR THE THIRD CIRCUIT STANDS ALONE IN CONCLUDING THAT SCINDIA DOES NOT APPLY TO ITS JUDGMENTS. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS CONFLICT TOGETHER WITH THE CONFLICT WHICH HAS DEVELOPED BETWEEN THE SECOND AND THIRD CIRCUITS IN THE INTERPRETATION AND APPLICATION OF SCINDIA.

In Scindia v. Steam Navigation Co. v. De Los Santos, 451 U.S. ___, 101 S. Ct. 1614 (1981), this Court pronounced the standard of care owed by vessel owners to longshoremen pursuant to §5(b) of the Longshoremen's and Harbor Workers' Compensation Act (Act), 33 U.S.C. §905(b), which was enacted by Congress in 1972 as one of several sweeping amendments to the Act. At the time Scindia was decided

Petitions for Certiorari were pending in twelve other cases which concerned the appropriate standard of care owed by vessel owners to longshoremen under 33 U.S.C. §905(b). The twelve cases were:

1. Harris v. Reederei, 596 F.2d 92 (4th Cir. 1979), petition for cert. filed, 47 U.S.L.W. 3815 (U.S. June 12, 1979) (No. 78-1851).

2. Mammoth Bulk Carriers, Ltd. v. Bachtel, 605 F.2d 438 (9th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3242 (U.S. Oct. 1, 1979) (No. 79-538).

3. Ernst Russ Steamship Co. v. Matthews, 603 F.2d 676 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3279 (U.S. Oct. 15, 1979) (No. 79-624).

4. McCulley v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3323 (U.S. Nov. 1, 1979) (No. 79-706).

5. American Commercial Lines, Inc. v. Griffith, 610 F.2d 116 (3d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3374 (U.S. Nov. 23, 1979) (No. 79-813).

6. Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), rehearing denied, 610 F.2d 818 (1980), petition for cert. filed, 48 U.S.L.W. 3538 (U.S. Feb. 8, 1980) (No. 79-1240).

7. Compania Maritime Navegacion Netumar, S.A. v. Irizarry, No. 79-7876 (2d Cir. May 22, 1980), petition for cert. filed, 49 U.S.L.W. 3031 (U.S. July 21, 1980) (No. 80-94).

8. Oceanic Navigation Corp. v. Sarauw, 622 F.2d 1168 (3d Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3135 (U.S. Aug. 18, 1980) (No. 80-245).

9. Futo v. Lykes Bros. Steamship Co., No. 79-3359 (5th Cir. May 27, 1980), petition for cert. filed, 49 U.S.L.W. 3252 (U.S. Sept. 20, 1980) (No. 80-455).

10. Raymond v. I/S Caribia, 626 F.2d 203 (1st Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3333 (U.S. Oct. 20, 1980) (No. 80-642).

11. Oriental Steamship Corp. v. McMichael, No. 78-2748 (9th Cir. June 25, 1980), petition for cert. filed, 49 U.S.L.W. 3388 (U.S. Nov. 10, 1980) (No. 80-745).

12. Silver Bulk Shipping Co. v. McCarthy, No. 80-1641 (3d Cir. Dec. 12, 1980), petition for cert. filed, 49 U.S.L.W. 3762 (U.S. March 12, 1981) (No. 80-1643).

After deciding Scindia, this Court granted the Petitions for Certiorari in six of the pending cases and denied the Petitions in the other six cases. On May 4, 1981, the Court granted the Petitions in Harris, Griffith, Sarauw, Futo and McCarthy. 49 U.S.L.W. 3824 (May 5, 1981). On May 18, 1981, the Court granted

the Petition in Bachtel. 49 U.S.L.W. 3863 (May 19, 1981). In granting the Petitions in these cases, this Court vacated the judgments entered by the various courts of appeals and remanded them for further consideration in light of Scindia. On May 4, 1981, the Petitions for Certiorari were denied in Matthews, McCulley, Stockstill, Irizarry, Raymond and McMichael. 49 U.S.L.W. 3824 (May 5, 1981).

On remand in Harris, the Fourth Circuit applied the Scindia principles and remanded the case to the district court for a new trial. The Fourth Circuit's opinion on remand is not yet reported but is set forth in the Appendix at 240. Specifically, the Fourth Circuit found that the jury instructions at the original trial were incompatible with Part IV of Scindia as emphasized by Justice Powell in his concurring opinion.

Of significance, the Fourth Circuit found dispositive the following passage from Scindia:

> [W]hether [the defective winch] could be safely used or whether it posed an unreasonable risk of harm to...longshoremen was a matter of judgment committed to the stevedore in the first instance....
>
> Yet it is quite possible, it seems to us, that [the stevedore's] judgment in this respect was so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

(App. 245-46).

On remand in Futo, the Fifth Circuit ordered the case back to the

district court "for further proceedings consistent with Scindia." The Fifth Circuit's per curiam Order dated July 21, 1981 is set forth in the Appendix at 251.

In Bachtel, the Ninth Circuit concluded that the jury instructions given by the district court at the original trial did not conform with Scindia. Thus, the case was remanded to the district court for a new trial with instructions to follow the principles set forth in Scindia. The Ninth Circuit's Order filed on June 29, 1981 is set forth in the Appendix at 249.

In granting Certiorari and vacating judgments entered by the Third Circuit in Griffith, Sarauw and McCarthy, this Court made the threshold determination that the standard established in Scindia applied to those three cases. Further, this Court impliedly recognized that the

Scindia standard was not applied to these cases at trial and that application of the Scindia standard might have resulted in judgments in favor of the vessel owners. This inference is supported by the fact that petitions in six similar cases were denied by the Court presumably because the proper standard was applied at trial, or, if not, the results could not have been different if the Scindia standard had been applied. Accordingly, this Court was instructing the Third Circuit to apply the Scindia standard and, if application of the standard required determinations by the factfinder, to remand to the district court for those determinations.

Unlike the Fourth, Fifth[5] and Ninth

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5. Where the factfinder evaluated the vessel owner's liability prior to this Court's opinion in Scindia and pursuant to a standard of care contrary to Scindia, the Fifth Circuit has consistently remanded the cases to the district courts for reconsideration in light of Scindia. See

Circuits, the Third Circuit did not follow this mandate. Rather, in each case on remand the Third Circuit ignored the Scindia standard and adhered to the standard it adopted in Griffith I which provides:

> At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the

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fn. 5 cont'd

Wild v. Lykes Brothers S.S. Corp., 650 F.2d 772 (5th Cir. 1981); McCullough v. S/S COPPENAME, 648 F. 2d 1036 (5th Cir. 1981); Roberts v. Andrew Martin Sea Services, Inc., 646 F.2d 1064 (5th Cir. 1981).

> longshoremen against that danger.

(App. 70-71).

The Third Circuit was even temerarious in suggesting that Scindia supported the Griffith I standard: "[W]e find in the Court's decision [in Scindia] support for our interpretation of Section 5(b) quoted above" (App. 9). In adhering to its Griffith I standard, the Third Circuit was not troubled that the Griffith I standard is virtually identical to the Ninth Circuit standard rejected by this Court in Scindia.[6]

The Ninth Circuit's formulation of the standard of care which was rejected by this Court in Scindia stated:

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6. Indeed, when the Third Circuit articulated its standard of care in Griffith I, it acknowledged that the standard was adopted from the Ninth Circuit standard in Scindia. (App. 70-71).

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and
>
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger.

598 F.2d at 485.

In remanding Griffith, Sarauw and McCarthy, surely this Court did not intend the Third Circuit to continue applying a standard of care specifically rejected in Scindia. Yet that is precisely what the Third Circuit has done. Most recently, in its opinion on remand

in McCarthy, the Third Circuit stated:

> At the time we originally entered judgment in this case, Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), which related to the issues presented herein, was the law of this Circuit. Griffith was also vacated and remanded to this Court by the Supreme Court for further consideration in light of Scindia. After reconsideration, this Court concluded that our holding in Griffith was unaffected by Scindia and reinstated Griffith's prior judgment.
>
> In the Griffith opinion after remand, we held that liability could be imposed upon a shipowner, inter alia, upon a showing that the vessel knew or should have known that the condition which caused the injury in question would pose an unreasonable risk of harm to longshoremen working on board ship.

(App. 15-16) (citations omitted) (emphasis added).

Earlier, when considering Griffith on remand, the Third Circuit, contrary to express language in Scindia, read Scindia to be limited to "dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." (App 7). Finding that the dangerous condition did not develop within the confines of the cargo operation, the Third Circuit found Griffith "clearly distinguishable" (App. 9) from Scindia and applied the standard of Griffith I. The Third Circuit allegedly found support for its position in the concurring opinion of Justice Brennan. In doing so, however, Part IV of this Court's opinion in Scindia was totally ignored as was the concurring opinion of Justice Powell.

In its opinion on remand in Sarauw, the Third Circuit held that the gangway owned, furnished, installed, maintained

and monitored by the stevedore was not an appliance "'within the confines of the cargo operations' assigned to the stevedore within the meaning of the rule laid down in the Scindia case." (App. 25-26). After circumventing Scindia, the Third Circuit reinstated its earlier opinion in Sarauw which was bottomed on two cases predating the 1972 amendment to section 5 of the Act. The Third Circuit stated:

> We are, accordingly, satisfied that Scindia does not require us to depart from our original conclusion, which we affirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. From this duty of care it could not divest itself even though the gangway was supplied by the stevedore...and at the time of the accident was being used by no one but the injured longshoreman.

(App. 27) (emphasis added).

Unmistakably, the Third Circuit has saddled vessel owners with a non-delegable duty of care with respect to gangways in clear contravention of 33 U.S.C. §905(b) and its legislative history.

By holding a vessel owner liable, ipso facto, whenever a condition exists on the vessel which may pose a risk of harm to the longshoremen if not properly handled by the stevedore, the Third Circuit has imposed a standard as onerous as the seaworthiness standard Congress abolished with the 1972 enactment of 33 U.S.C. §905(b). Not only does this standard put vessel owners in a worse position than prior to the 1972 amendments (because of the abolition of indemnity from stevedores), it also destroys the stevedore's incentive to protect the safety of its workers, a consideration highlighted by Justice Powell in his concurring opinion in Scindia.

The decisions of the Third Circuit in the present cases are diametrically opposed to the decision of the Second Circuit in Albergo v. Hellenic Lines, Inc., No. 81-7006 (2d Cir. Aug. 21, 1981), an opinion not yet reported but set forth in the Appendix at 253. In Albergo, a longshoreman was injured when he tripped on rope lashings that had been cut from the cargo by the vessel's crew during the stevedoring operation and were left lying on the deck. The Second Circuit affirmed a judgment n.o.v. in favor of the vessel owner explaining:

> The duty to clear away any loose debris when that can be done as plaintiff did it here, is placed squarely on the stevedore employer, not the vessel owner. Thus, the danger to be perceived, if any, spells the duty of the stevedore to be observed. With the duty on the plaintiff's employer it would be contradictory to suggest that loose debris of the

> sort here involved, so easily removable as it was here, by hand, can establish liability for negligence on the part of the vessel owner. The longshoreman is adequately protected by looking to his employer for compensation when injured by accident.... [I]t must be said that as a matter of law there was no factual or legal basis for an anticipation by the ship that the plaintiff would be unable to avoid the claimed hazard despite its obviousness and the way he himself dealt with it.

(App. 262-63).

Clearly, the Second Circuit applied the principles set forth in Part IV and the concurring opinion of Justice Powell in Scindia. Many of the Scindia principles were adopted from Evans v. Transportacion Maritime Mexicana SS "Campeche", 639 F.2d 848 (2d Cir. 1981), a case cited by the Albergo court in support of its holding. Justice Powell's concurring opinion makes it clear that Evans is

consistent with Part IV of Scindia. 101 S.Ct. at 1628, "n.," 1.

By ignoring Part IV of Scindia, the Third Circuit allows liability to be imposed on a vessel owner without regard to whether the stevedore also knows of the condition posing an unreasonable risk of harm to the longshoreman and without regard to whether the stevedore's judgment in allowing its longshoremen to continue to be exposed to the danger is so obviously improvident as to require the vessel owner to intervene. This Court should not tolerate such an aberration from the Scindia standard.

Properly read, it is clear that Scindia is not to be limited to the facts and circumstances under consideration there. Rather, this Court intended the Scindia standard to be broadly applied to all longshoremen personal injury cases governed by 33 U.S.C. §905(b), including

the three cases remanded to the Third Circuit. In light of the nine year period between the enactment of §905(b) and its interpretation by this Court in Scindia and viewed against the myriad interpretations of that section by inferior courts during that period, there is no justification for the Third Circuit's narrow reading of Scindia. In order to rectify the aberration created by the Third Circuit, this Court should grant review and reverse their judgments in the three cases under consideration.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS REJECTED THE STANDARD OF CARE ENUNCIATED IN SCINDIA STEAM NAVIGATION CO v. DE LOS SANTOS, 451 U.S. ___, 101 S.CT. 1614 (1981), IN FAVOR OF THE STANDARD OF CARE IT ARTICULATED IN GRIFFITH v. WHEELING-PITTSBURGH STEEL CORP., 610 F.2d 116 (3d CIR. 1979). SPECIFICALLY, THE THIRD CIRCUIT REJECTED PART IV OF SCINDIA AS EMPHASIZED BY THE CONCURRING OPINION OF JUSTICE POWELL AND ALSO ALLOWED A VESSEL OWNER'S LIABILITY TO BE BASED ON A NON-DELEGABLE DUTY OF CARE IN CONTRAVENTION OF 33 U.S.C. §905(b). THIS COURT

SHOULD GRANT CERTIORARI TO INSURE THAT THE THIRD CIRCUIT AND THE DISTRICT COURTS THEREIN APPLY THE STANDARD OF CARE FORMULATED IN Scindia.

In deciding Griffith on remand, the Third Circuit steadfastly refused to retreat from the three-pronged standard it established in Griffith I. Rather, the Third Circuit reiterated that three-pronged standard and repeated its earlier holding that the district court was not clearly erroneous in finding that the three criteria had been met. (App. 6-7). To support its position, the Third Circuit misinterpreted the procedural posture of Scindia when it was decided by this Court. Referring to Scindia, the Third Circuit stated:

> The case involved a dangerous piece of equipment on the vessel, not found to have been brought to the vessel owner's attention prior to commencement of stevedoring operations, and also improvident use by the stevedore of that

> equipment, not found to have been anticipated by the vessel owner.

(App. 8).

Contrary to the assertions of the Third Circuit, no factfinder had considered, much less decided, the points which the Third Circuit deemed established. When this Court decided Scindia, it was considering the propriety of the Ninth Circuit's reversal of the district court's entry of summary judgment in favor of the vessel owner. In Part IV of Scindia, this Court emphasized that a vessel owner's liability is to be decided by the factfinder under the rules laid down therein where the dangerous condition is known both by the vessel owner and the stevedore. In this connection, Scindia states:

> If Scindia was aware that the winch was malfunctioning to some degree, and if there was a jury issue as to whether it was so unsafe

> that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that Scindia should have intervened and stopped the loading operation until the winch was serviceable?
>
> We raise these questions but do not answer them, since they are for the trial court in the first instance and since neither the trial nor appellate courts need deal with them unless there is sufficient evidence to submit to the jury either that the shipowner was aware of sufficient facts to conclude that the winch was not in proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition.... The case should be returned to the District Court and, if necessary, tried to a jury under appropriate instructions.

101 S.Ct. at 1627. (emphasis added).

Having misinterpreted the procedural posture of Scindia, the Third Circuit on remand in Griffith then misinterpreted or

ignored Part IV of Scindia by concluding that Part IV analysis is not required when the dangerous condition exists at the time control of the vessel is surrendered to the stevedore. (App. 7-9). Part IV of Scindia, however, is not so limited. Part IV applies to dangerous conditions which exist at the time control of the vessel is surrendered to the stevedore as well as dangerous conditions which develop during the cargo operations. In phrasing the issue under consideration in Part IV this Court stated:

> What are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman? Must the owner take some action?

101 S.Ct. at 1624. (emphasis added).

The pivotal aspect of Part IV analysis, totally ignored by the Third Circuit,

is the vessel owner's and stevedore's joint knowledge of the dangerous condition. This is brought into sharp focus in Justice Powell's concurring opinion:

> [T]he opinion makes clear that the shipowner has only a limited duty with respect to obvious hazards of which it is aware. Although the shipowner cannot rely in all cases on the judgment and primary responsibility of the stevedore concerning what conditions allow safe work to continue, safety is a 'matter of judgment committed to the stevedore in the first instance.' Only where the judgment of the stevedore is 'obviously improvident,' and this poor judgment either is known to the shipowner or reasonably should be anticipated under the circumstances, does the shipowner have a duty to intervene.

101 S.Ct. at 1628.

The per curiam opinion of the Third Circuit in McCarthy on remand repeats and compounds the errors made in Griffith on

remand. In McCarthy the Third Circuit states:

> In the Griffith opinion after remand, we held that liability could be imposed upon a shipowner, inter alia, upon a showing that the vessel knew or should have known that the condition which caused the injury in question would pose an unreasonable risk of harm to longshoremen working on board ship.

(App. 16). It is difficult to imagine a clearer repudiation of Scindia Part IV analysis as amplified by Justice Powell in his concurring opinion.

In both Griffith and McCarthy the stevedore knew of the condition which caused harm to the longshoreman. Nonetheless, the Third Circuit refused to remand those cases to the district courts for the determinations mandated by Scindia: 1) Whether the vessel owner knew of the dangerous condition, 2) Whether the vessel owner knew that the stevedore was

continuing to work in the face of the dangerous condition and 3) Whether the stevedore's judgment in continuing to work in the face of the dangerous condition was so obviously improvident as to require the vessel owner to intervene.

The Third Circuit's judgment on remand in McCarthy is particularly egregious since the district court recognized that the stevedore had knowledge of the condition causing McCarthy's accident but concluded that the stevedore's knowledge was not relevant in determining the vessel owner's liability. (App. 185-86). Further, the district court concluded that the stevedore's negligence was not an issue in the case and refused to allow into evidence the OSHA regulation applicable to the stevedore's duty. (App. 189-93). These rulings of the district court contravene the express mandate of this Court that:

> [T]he legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the vessel has breached its duty. The trial court and where appropriate, the jury, should thus be made aware of the scope of the stevedore's duty under the positive law.

101 S.Ct. at 1626. (emphasis added).

The Third Circuit displayed similar recalcitrance in its ruling on remand in Sarauw. In deciding that the gangway owned and furnished by the stevedore was outside the Scindia rule, the Third Circuit cited no authority for the remarkable proposition that a gangway is an appliance outside the confines of cargo operations. It is axiomatic that a stevedore cannot perform its work aboard a vessel unless its employees can get to and from the work site on the vessel. The gangway is the means whereby the

longshoremen can board the vessel and get to the work site and is as much a part of the cargo operation as the stevedore-furnished crane in Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977).

The Third Circuit holding in Sarauw is squarely in conflict with the Department of Labor's determination that gangways are within the stevedore's cargo operations. OSHA Regulation §1918.11 of the Safety & Health Standards for the Longshoring Industry is entitled "GANGWAYS" and provides in pertinent part:

> The employer shall not permit employees to board or leave any vessel...until the following requirements have been met:
>
> (a) Whenever practicable, a gangway of not less than 20 inches walking surface, of adequate strength, maintained in safe repair and safely secured shall be used.[7]

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7. Sarauw's accident happened because the gangway on which he was climbing was not secured.

29 C.F.R. 1918.11. (emphasis added).

By adopting a standard for gangways the Department of Labor has expressly included gangways within the ambit of longshoring operations. See 29 C.F.R. §1910.16(a).

Similarly, the Third Circuit was unconcerned that the jury in Sarauw was instructed that the vessel owner's liability was governed by §§343 and 343A of the Restatement (Second) of Torts (App. 219-27), a standard rejected by this Court in Scindia. 101 S.Ct. at 1622, "n.," 14. On this point, the Third Circuit stated: "We remain satisfied, as we were when the case was here before, that the instructions fairly presented this issue to the jury..." (App. 29).

Most importantly, however, the imposition of a non-delegable duty of care on vessel owners vis-a-vis gangways owned, furnished, installed, maintained and monitored by stevedores is wholly

repugnant to the delicate balance struck by Congress in enacting 33 U.S.C. §905(b). In footnote 13 of Scindia, this Court referred to the legislative history of the 1972 amendments to the Act and observed that vessel owners are not to be found liable based on a "non-delegable duty" or for defects in the stevedore's equipment. 101 S.Ct. at 1621, "n.," 13. The Third Circuit's ruling on remand in Sarauw violates both principles. Additionally, by requiring vessel owners to furnish a constant watchman at the gangway the Third Circuit repudiates this Court's holding in Part III of Scindia. Hence, in the Third Circuit, the following passage from Scindia is, for the present, without effect:

> The 1972 amendments foreclosed indemnity of the shipowner by the stevedore in §905(b) cases; but they also rejected the notion of a nondelegable duty on the shipowner to provide a safe place to work and did

> not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations.
>
> . . .
>
> [A]bsent contract provision, positive law or custom to the contrary... the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty.

101 S.Ct. at 1624.

Griffith, Sarauw and McCarthy were decided by factfinders under standards expressly rejected by this Court in Scindia. This Court recognized the erroneous underpinnings of the district court judgments in these three cases and granted Writs of Certiorari to the United States Court of Appeals for the Third Circuit so that these errors could be corrected. Contary to the mandate of this Court, the Third Circuit perpetuated the erroneous underpinnings of the district court judgments. To assure that the Third Circuit and the district courts therein evaluate the liability of vessel owners pursuant to the standards set forth in Scindia, this Court should grant review and reverse the judgments of the Court of Appeals for the Third Circuit.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the judgments of the Third Circuit Court of Appeals.

Respectfully submitted,

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Appendix

Supreme Court, U.S.
FILED
OCT 29 1981
ALEXANDER L. STEVAS

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

AMERICAN COMMERICAL LINES, INC.
Petitioner

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION
Respondents

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS
Petitioners

v.

LAWRENCE A. SARAUW
Respondent

SILVER BULK SHIPPING, LTD.
Petitioner

v.

WILLIAM MC CARTHY
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH,

Appellant in No. 78-2159
Appellee in Nos. 78-2160/61

v.

WHEELING-PITTSBURGH STEEL CORPORATION,

Appellant in No. 78-2160
Appellee in Nos. 78-2159 and 78-2161

v.

AMERICAN COMMERCIAL LINES, INC.,
Appellant in No. 78-2161
Appellee in Nos. 78-2159/60

(Western Dist. of Penna.
D.C. Civil No. 73-0706)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

No. 79-813

Submitted:
Before: GIBBONS, WEIS and HIGGINBOTHAM,
Circuit Judges
(Opinion Filed: August 11, 1981)

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OPINION OF THE COURT

GIBBONS, Circuit Judge

This case is before us on remand from the Supreme Court, which on May 4, 1981 granted certiorari to review our decision in Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979) vacated our judgment, and remanded for further consideration in light of its decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____, 49 U.S.L.W. 4405 (1981). The parties were requested to file supplemental briefs

addressed to the effect of the Scindia case on our judgment. Having considered those briefs and the several opinions filed in Scindia we conclude that our prior judgment is consistent with the Court's interpretation of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (hereafter "the Act"), and should be reinstated.

In our most recent opinion[1] we held that the district court judgment against Wheeling-Pittsburgh in favor of the plaintiff must be vacated and remanded for further findings as to Wheeling-Pittsburgh's status as an owner pro hac vice. That decision is in no way affect-

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[1] Earlier this court reversed an award of summary judgment to Wheeling-Pittsburgh. See 384 F. Supp. 230 (W.D. Pa. 1974), rev'd, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976), on remand, 452 F. Supp. 841 (W.D. Pa. 1978).

ed by the Supreme Court's remand. We also held that the district court properly rejected Wheeling-Pittsburgh's claim that if it is an owner pro hac vice, it should be fully indemnified by the actual owner, American Commercial Lines, Inc. That holding likewise is unaffected by the Supreme Court's remand. We held, too, that if Wheeling-Pittsburgh is determined on remand to be an owner pro hac vice, it and American Commercial Lines, Inc. would be jointly and severally liable to the plaintiff, but the amount for which each would be liable must be redetermined because Wheeling-Pittsburgh would not be liable for contribution for negligence attributable to it in its capacity as a stevedore rather than as owner pro hac vice. The Supreme Court's remand in no way affects that holding. Finally, we held that American Commercial Lines, Inc. was negligent in delivering a

barge with a defective cover mechanism knowing that workers such as the plaintiff would be thereby exposed to an unreasonable risk of injury for those defects. Only this negligence holding is within the contemplation of the Supreme Court's remand, since we noted in our last opinion, "Wheeling does not contest that, if it was properly held to be an owner pro hac vice, it was guilty of negligence in that capacity." 610 F.2d at 127. It did not petition for certiorari, and concedes in its supplemental brief that the only question open to it on remand is its status as an owner pro hac vice (Brief of Wheeling-Pittsburgh on Remand at 5). Thus the only question presented by the remand is whether Scindia requires us to reconsider our affirmance of the district court's holding that American Barge Lines, Inc. was negligent.

Our interpretation of Section 5(b) of the Act, 33 U.S.C. §905(b), was as follows:

> The sounder approach, we think, is to recognize that §905(b) imposes on vessel owners the same duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business.... Proceeding from this broad common law standard, federal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the "land based" standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.
>
> At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board the ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

610 F.2d at 125-26. Reviewing the district court's application of the standard of reasonable care under all the circumstances, we held that each of these three criteria had been found and that the findings were not clearly erroneous. In particular the court found, and the evidence supported the findings, that American Commercial Lines, Inc. knew of the defective condition of the hatch cover, and was aware that Wheeling-Pittsburgh regularly used a method of removing stuck barge covers which would expose longshoremen to risk of harm. 610 F.2d at 126.

The holding of Scindia is that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." 49 U.S.L.W.

at 4410 (emphasis added). The case involved a dangerous piece of equipment on the vessel, not found to have been brought to the vessel owner's attention prior to commencement of stevedoring operations, and also improvident use by the stevedore of that equipment, not found to have been anticipated by the vessel owner. In this context, the Court ruled that "as a general matter" the vessel owner was entitled to assume that the stevedore would discover patent defects and avoid the risk they presented. Id. 4409. Here, by contrast the district court found that prior to turning control of the barge over to the stevedore, American Commercial Lines, Inc. knew or should have known of the defect, and had reason to believe that Wheeling-Pittsburgh might use a negligent method to remove stuck hatch covers, but took no steps to prevent harm to the

injured longshoreman. Thus Scindia is clearly distinguishable from this case.

Moreover, we find in the Court's decision support for our interpretation of Section 5(b) quoted above. Referring to the duty owed by a vessel to longshoremen before cargo operatins began, Justice White described it thus:

> [T]he vessel oews to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. 394 U.S. at 416 n.18. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools

> and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care he has breached his duty and is liable if his negligence causes injury to a longshoreman.

49 U.S.L.W. at 4408. While the quoted language does not deal with the precise situation in this case, of a shipowner with actual knowledge of a defect and a reasonable ground for believing that the stevedore will not remedy the resulting unsafe conditions, it is certainly consistent with the imposition of liability in such circumstances. That interpretation of the opinion of the Court is confirmed by Justice Brennan's concurring opinion:

> My views are that under the 1972 Amendments: (1) a shipowner has a general duty to exercise reasonable care under the circumstances; (2) in exercising reasonable care, the shipowner must take reasonable steps to determine whether the ship's equipment is safe before turning that equipment over to the stevedore; (3) the shipowner has a

> duty to inspect the equipment turned over to the stevedore or to supervise the stevedore if a custom, contract provision, law or regulation creates either of those duties; and (4) if the shipowner has actual knowledge that equipment in the control of the stevedore is in an unsafe condition, and a reasonable belief that the stevedore will not remedy that condition, the shipowner has a duty either to halt the stevedoring operation, to make the stevedore eliminate the unsafe condition, or to eliminate the unsafe condition itself.
>
> Since I read the Court's opinion to be consistent with these views, I join the Court's opinion.

49 U.S.L.W. at 4412 (Emphasis supplied).

Even if it remains jointly liable with Wheeling-Pittsburgh qua owner pro hac vice, American Commercial Lines, Inc. nonetheless submits that its potential share of liability is reduced by Scindia because of the significance that decision attaches to a vessel's knowledge of the negligence of the stevedore. American argues that its share of the total award must necessarily be less than Wheeling-

Pittsburgh's if the latter's agent had actual, rather than constructive, knowledge of the stevedore crew's poor judgment shortly before the accident happened. However, we discern nothing in Scindia which requires that the calculation of comparative fault mirror distinctions between actual and constructive knowledge to the exclusion of all other factors.

The judgment of this court entered upon our opinion reported at 610 F.2d 116, dated August 24, 1979, will be reinstated.

A True Copy:
Teste:

Clerk of the United
States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1641

WILLIAM McCARTHY

v.

SILVER LINE, LTD. and
SILVER BULK SHIPPING, LTD.

Silver Bulk Shipping, Ltd.
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(C.A. No. 78-1484)

Argued December 5, 1980

ON REMAND FROM THE
UNITED STATES SUPREME COURT
No. 80-1643

Order Dated May 4, 1981

Before: ADAMS, GARTH and SLOVITER,
Circuit Judges

(Filed October 20, 1981)

ROBERT B. WHITE, Jr.
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Philadelphia, PA 19107
Attorneys for Appellant

CHARLES SOVEL
Freedman and Lorry, P.C.
Philadelphia, PA 19106
Attorneys for Appellee

OPINION OF THE COURT

PER CURIAM:

William McCarthy was injured while unloading a vessel owned by Silver Bulk Shipping, Ltd. The vessel was a bulk sugar carrier, and while McCarthy, a longshoreman, was helping to unload it he was hit on the head by a frozen piece of caked sugar. McCarthy sued the shipowner under section 18(a) of the Longshoremen and Harbor Workers Compensation Act of 1972, 33 U.S.C. §905(b) (1976).

After a jury verdict in favor of McCarthy, judgment was entered for him. The trial court subsequently denied a motion for judgment n.o.v. Silver Bulk Shipping appealed, and the judgment of the district court was affirmed by a judgment order on December 12, 1980.

Thereafter, Silver Bulk Shipping filed a petition for certiorari with the United States Supreme Court. The Supreme Court vacated the judgment of this Court and remanded for further consideration in light of Scindia Steam Navigation Com. v. De Los Santos, 451 U.S. _____ (1981). 49 U.S.L.W. 3824 (1981).

At the time we originally entered judgment in this case, Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), which related to the issues presented herein, was the law of this Circuit. Griffith was also vacated and remanded to this Court by the Supreme Court for further consideration in light of Scindia. After reconsideration, this Court concluded that our holding in Griffith was unaffected by Scindia and reinstated Griffith's prior judgment. Griffith v. Wheeling-Pittsburgh Steel Corp., Nos. 78-2159, 79-2160, 79-2161 (3d Cir. Aug. 11, 1981).

In the Griffith opinion after remand, we held that liability could be imposed upon a shipowner, inter alia, upon a showing that the vessel knew or should have known that the condition which caused the injury in question would pose an unreasonable risk of harm to longshoremen working on board ship. Id., slip op. at 6. In the case at bar, the jury found that the dangerous condition caused by the negligence of the shipowner could not have been remedied by a reasonable stevedore. Therefore, the situation in this case is analogous to that presented by Griffith.

After full consideration of the briefs in the case at hand, and after reconsideration of the issues presented here in light of the Supreme Court's opinion in Scindia and this Court's opinion on remand in Griffith, we now reaffirm our original judgment entered on

December 12, 1980, and affirm the judgment of the district court entered on March 19, 1980.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2076

LAWRENCE A. SARAUW

v.

OCEANIC NAVIGATION CORPORATION
and
VLCC ANDROS ATLAS,

Appellants

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES
(No. 80-245)

(Appeal from the District Court
of the Virgin Islands
Division of St. Croix,
Civil Action no. 78-57)

Submitted on Remand
June 8, 1981

Before: ADAMS, MARIS and SLOVITER,
Circuit Judges

(Opinion filed July 31, 1981)

Robert B. White, Jr.
Rawle & Henderson
Philadelphia, PA 19102
Attorneys for Appellants

Joseph L. Costello
Sonoma, Cal. 95476
Attorney for Appellee

OPINION OF THE COURT

MARIS, Circuit Judge

This appeal from the district court's award of damages to a longshoreman in his action against a vessel and its owner in which appeal we entered a judgment on May 20, 1980, is again before us, the Supreme Court having, on the grant of the defendants' petition for a writ of certiorari, vacated our judgment and remanded the appeal to us for reconsideration in the light of that Court's recent decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981).

Lawrence A. Sarauw, a longshoreman dock worker employed by Hess Oil Virgin Islands Corporation (hereafter Hess), brought this action in the district court against the vessel, VLCC ANDROS ATLAS, and its owner, Oceanic Navigation Corporation (hereafter Oceanic), pursuant to section 18(a) of the Longshoremene's and

Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C.A. §905(b). That secion provides that a longshoreman sustaining injuries attributable to the negligence of the personnel of a vessel may sue the vessel for damages. Sarauw alleged that due to the negligence of the officers of the ANDROS ATLAS in failing to secure to the deck of the vessel the gangway connecting the vessel with the Hess Terminal's No. 3 dock where the ANDROS ATLAS was discharging crude oil, the gangway, when Sarauw attempted to board the vessel by means of it, fell to the dock, Sarauw thereby sustaining the injuries complained of.

After a trail lasting four days, a jury found that Oceanic was negligent, that Sarauw was contributorily negligent, that Hess also was negligent, and that Sarauw's total damages were $190,800.00. The district court, on March 27, 1979,

entered judgment for Sarauw reducing the total damages found by the jury by 50%, the jury having determined the degree of fault of Sarauw and Hess to be 25% each. Following the district court's denial, on June 8, 1979, of Sarauw's motion for judgment notwithstanding the verdict and to amend the judgment and Oceanic's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, both parties appealed.

With respect to Sarauw's appeal, we held that the district court's 25% reduction of damages for Hess' negligence was error under Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979). Our ruling on that issue was not contested by Oceanic. As to the issues raised by Oceanic on its appeal, on the question of Oceanic's duty of care we concluded that there was sufficient evidence from which a jury could find that Oceanic

retained a duty of care with respect to the gangway notwithstanding that it was supplied by Hess, and that Oceanic breached its duty of care. On the question of the district court's instructions based on sections 343 and 343A of the Restatement (Second) of Torts, we held that any error in applying to Oceanic the duty of care set forth in those sections of the Restatement benefited Oceanic and was not ground for reversal of the district court's judgment against Oceanic. With respect to Oceanic's contention, not raised in the district court, that elements of damages awarded Sarauw were duplicative, we held that no reviewable, plain error had been committed. Pursuant to the above rulings, we affirmed that part of the district court's judgment notwithstanding the verdict or for a new trial and vacated that part of the judgment which denied Sarauw's motion for

judgment notwithstanding the verdict and to amend the judgment. We remanded the case to the district court with instructions to enter a new judgment restoring the deduction from the jury's damages award made for Hess' negligence.

Oceanic then applied to the Supreme Court for a writ of certiorari. The writ was allowed on May 4, 1981, and on the same day the Supreme Court vacated our judgment and ordered our reconsideration of the cause in the light of the Court's recent rulings in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981), explicating the extent of a vessel's duty of care to longshoremen under 33 U.S.C.A. §905(b). Counsel, at our request, have submitted briefs on the issues raised by the remand.

The facts of the case are set out in our earlier opinion, 622 F.2d 1168 at p. 1171, and we need not repeat them here.

The Scindia case gives us no reason to reconsider our conclusion on the damages issue raised by Oceanic's appeal and our position on that issue, stated above, remains unchanged. We, accordingly, proceed to address the liability issues presented by Oceanic's appeal in the light of the ruling of the Supreme Court in Scindia. In that case the Court pointed out that under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, particularly §905(b), "Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore." 451 U.S. at p. . "We are of the view," the Court went on to say, "that absent contract provision, positive law or custom to the contrary . . . the shipowner has no general duty by way of

supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoreman for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself." 451 U.S. at p. .

The precise question which this case presents on remand is whether the gangway here involved which was supplied by the stevedore and used by its longshoremen was an appliance which was "within the confines of the cargo operations" assigned to the stevedore within the meaning of the rule laid down in the Scindia case and, therefore, outside the general duty of the shipowner to use reasonable care to inspect and supervise for the purpose of discovering and remedying

dangerous conditions which might exist or develop in the course of its use. We do not think that the gangway involved in this case falls into that category. Conceivably, there might be a case in which a special gangway, which is in addition to the ship's regular gangway, is supplied by a stevedore for the exclusive use of its longshoremen in carrying out its cargo operation and which therefore, might be regarded as wholly within the confines of that operation under the Scindia rule. But this is clearly not such a case.

Here the stevedore, Hess, which was the owner of the marine terminal at which the ANDROS ATLAS was unloading, required all vessels unloading at its terminal to use only gangways supplied by it, the stevedore. Accordingly, here the gangway supplied by the stevedore became the vessel's gangway in that sense that it

was the only gangway available to the vessel. It was, therefore, necessarily used for embarking and disembarking by the officers and crew of the vessel and any others having business on her as well as by the longshoremen. It thus became, when put in place, a basic appurtenance of the vessel, its means of access to the land. The Admiral Peoples, 295 U.S. 649 (1935). We are, accordingly, satisfied that Scindia does not require us to depart from our original conclusion, which we reaffirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use. From this duty of care it could not divest itself even though the gangway was supplied by the stevedore, Hess, and at the time of the accident was being used by no one but the injured lonshoreman. Romero Reyes v.

Marine Enterprises, Inc., 494 F.2d 866, 870 (1st Cir. 1974).

Oceanic argues in its brief on remand that under Scindia a shipowner's ordinary duty of care may be modified by contract and that in its "contractual undertaking with Oceanic, Hess obligated itself to . . . furnish, secure, maintain and monitor the gangway to be used on Oceanic's vessel." We are not convinced, however, that Scindia instructs that a shipowner may contract away its duty of care with respect to such an essential appurtenance of the ship as the gangway. Moreover, while there was evidence in the record that Hess instructed its personnel to monitor the safety of the gangways of the ships docked at its terminal, there was no evidence of an agreement under which Hess undertook to relieve the ANDROS ATLAS of its legal obligation concerning the gangway here involved.

In the present case there was evidence from which the jury could find, as it did, that Oceanic failed in its duty of exercising due care to discover and correct the unsafe condition of the gangway which, obviously, became more and more critical as the vessel rose in the water during unloading. We remain satisfied, as we were when the case was here before, that the instructions fairly presented this issue to the jury and that Oceanic's motion for judgment notwithstanding the verdict or for a new trial was properly denied. The other issues are discussed in our former opinion and are not involved in this remand. We, therefore, need not discuss them here.

The judgment entered by this court in this case on May 20, 1980 will be reinstated.

ADAMS, Circuit Judge, concurring.

I agree that our previous judgment in this case should be reinstated, but I write separately to illustrate why, in my view, the reasoning in the prior opinion is consistent with Scindia Steam Navigation Co., Ltd. v. De Los Santos, 490 U.S.L.W. 4405 (U.S. Apr. 21, 1981).

Although the thrust of the opinion in Scindia is to restrict the shipowners' liability to longshoremen injured in the midst of stevedoring operations, the case does not proclaim that a vessel may never be found negligent in connection with mishaps suffered by longshoremen. The Supreme Court crafted at least two exceptions to the freshly promulgated policy against holding the shipowner responsible. First, the Court noted that it is "accepted that the vessel may be liable . . . if it fails to exercise due care to avoid exposing longshoremen to harm from

hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation." 49 U.S.L.W. at 4408. Second, the Court indicated that in some circumstances "positive law or custom" may impose on the shipwoner "a duty of supervisory inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations." 49 U.S.L.W. at 4410.

Both of these principles are directly applicable to the case at hand. In our initial opinion we held that the shipowner maintained control over the manner in which the gangway was to be secured. 622 F.2d 1168, 1172 (3d Cir. 1980). Relying on testimony by the plaintiff's expert, which was corroborated by the ship's captain and second officer, we also affirmed the trial

court's finding that the evidence established a duty on the part of the shipowner to secure, maintain, and watch over the gangway. Id. at 1172. The source of this duty is the custom of "good seamanship" and the tradition of maritime law. The present case therefore comes within the circumstances delineated in Scindia, under which the shipowner may be found liable for injuries to longshoremen occurring during stevedoring operations. The vessel owner did not exercise due care with regard to the gangway area, which remained under the vessel's active control, see 490 U.S.L.W. at 4408; and, the custom of admiralty dictates that the shipowner had a continuing duty to watch over and inform itself about hazards involving the gangway and the manner in which it was fastened to the ship, see 49 U.S.L.W. at 4410. Although this duty to inspect and supervise may be shared with

the stevedore by contract, according to the trial testimony the shipowner may not transfer the ultimate responsibility.

The vessel owner argues that Scindia hinged on a distinction between equipment owned by the vessel and items owned by the stevedore. The previously quoted language in the Supreme Court's opinion, which emphasizes control and duty, rather than ownership, is at variance with the shipowner's interpretation of Scindia. Control over the defective condition remains a crucial factor in imposing liability. This conclusion is consistent with the policy underlying the Supreme Court's decision. The Court disparaged rules that would "result in holding the shipowner solely liable for conditions that are attributable to the stevedore." 49 U.S.L.W. at 4409. This result would come about when the owner has no control over a defective condition. When the

owner retains a measure of control, however, a defect cannot fairly be attributed solely to the neglect of the stevedore. In the present case, for example, the jury found that both the stevedore and the owner had some control over the gangway and that both negligently breached their respective duties to monitor the way in which the gangway was attached to the ship.

Because our initial opinion in this matter correctly presaged the role the Supreme Court assigned in Scindia to control by the vessel owner over the area in question and to a customary duty to inspect, it remains viable. I therefore agree that the judgment for Sarauw must be reinstated.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

SUPREME COURT OF THE UNITED STATES

NO. 79-813

American Commercial Lines, Inc.,

Petitioner,

v.

Thomas W. Griffith, et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981).

IT IS FURTHER ORDERED that the petitioner, American Commercial Lines, Inc., recover from Thomas W. Griffith, et al. One Hundred Dollars ($100.00) for its costs herein expended.

May 4, 1981

Clerk's costs: $100.00

SUPREME COURT OF THE
UNITED STATES

No. 80-1643

Silver Bulk Shipping, Ltd.,

Petitioner,

v.

William McCarthy

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981).

IT IS FURTHER ORDERED that the petitioner, Silver Bulk Shipping, Ltd., recover from William McCarthy Two Hundred Dollars ($200.00) for its costs herein expended.

May 4, 1981

Clerk's costs: $200.00

SUPREME COURT OF THE UNITED STATES

No. 80-245

Oceanic Navigation Corporation
and VLCC Andros Atlas,

Petitioners,

v.

Lawrence A. Sarauw

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of Scindia Steam Navagation Co. v. De Los Santos, 451 U.S. _____ (1981).

IT IS FURTHER ORDERED that the petitioners, Oceanic Navigation Corporation

and VLCC Andros Atlas, recover from Lawrence A. Sarauw Two Hundred Dollars ($200.00) for their costs herein expended.

May 4, 1981

Clerk's costs: $200.00

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH

v.

WHEELING-PITTSBURGH STEEL CORPORATION,
et al.

THOMAS W. GRIFFITH,
Appellant in No. 78-2159

WHEELING-PITTSBURGH STEEL CORPORATION,
Appellant in No. 78-2160

AMERICAN COMMERCIAL LINES, INC.,
Appellant in No. 78-2161

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 73-0706)

Argued June 7, 1979

Before: GIBBONS, WEIS and
HIGGINBOTHAM,
Circuit Judges

(Opinion filed August 24, 1979)

THOMAS L. COOPER, Esquire
(Argued)
Gilardi & Cooper

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Pittsburgh, PA 15222
Attorneys for
Thomas W. Griffith

William L. Standish, Esquire
(Argued)
Arthur H. Stroyd, Jr., Esquire
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Attorneys for
Wheeling-Pittsburgh
Steel Corporation

John W. Jordan, IV, Esquire
(Argued)
Thomson, Rhodes & Grigsby
1724 Frick Building
Pittsburgh, PA 15219
Attorneys for
American Commercial
Lines, Inc.

OPINION OF THE COURT

GIBBONS, Circuit Judge:

Thomas W. Griffith, an employee of Wheeling-Pittsburgh Steel Corporation (Wheeling) commenced this action in August 1973 against his employer, and against American Commercial Lines, Inc. (American), the owner of barge No. 2730,

pursuant to §18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. 33 U.S.C. §905(b). He sought damages for injuries sustained on May 26, 1973 when he fell into the hold of barge No. 2730. Both defendants denied liability to Griffith, and each cross-claimed against the other for indemnification and contribution. Both also moved for summary judgment against Griffith and against each other on their respective cross-claims. The district court granted Wheeling's motion for partial summary judgment, dismissing Griffith's negligence claim against Wheeling, and barring any claim for contribution or indemnity by American against Wheeling.[1] The order granting partial summary judgment was

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[1] Griffith v. Wheeling Pittsburgh Steel Corp., 384 F. Supp. 230 (W.D. Pa. 1974).

entered as a final judgment, and this court then considered appeals by Griffith and American from that order. We reversed and remanded for further proceedings consistent with our opinion.[2]

Following a non-jury trial the district court held both Wheeling and American liable to Griffith on a negligence theory. It further found that Griffith had suffered compensatory damages in the amount of $209,299.45, but reduced his recovery by 25% because it found that 25% of those damages was attributable to Wheeling's negligence in a stevedoring capacity. On June 15, 1978, the court entered judgment against American for

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[2] Griffith v. Wheeling Pittsburgh Steel Corporation, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976) (Griffith I). The Griffith I court affirmed the district court's holding that Griffith was not a Jones Act seaman, and therefore had no Jones Act remedy against either defendant. 521 F.2d at 36-38.

$104,649.73 (50% of Griffith's damages) and against Wheeling for $52,324.87 (25% of those damages) a total of $156,974.60.[3] All parties appeal from this final judgment. Once again we must remand for further proceedings.

I. FACTS

The facts respecting Griffith's employment in the Wheeling common labor pool at Allenport, Pennsylvania, his assignment on the day of the accident to work with a barge crew at the river landing, and the happening of the accident are detailed in our previous opinion. That appeal reviewed the summary judgment record. The trial court's findings of fact after the trial confirm that statement in all

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[3] Griffith v. Wheeling-Pittsburgh Steel Corp., 452 F. Supp. 841 (W.D. Pa. 1978).

material respects, and we repeat it here.

> Appellee Wheeling-Pittsburgh Steel Corporation (Wheeling) operates a steel mill along the banks of the Monongahela River at Allenport, Pennsylvania. It first employed appellant Thomas Griffith on February 11, 1973, about four months before the date of the injury that was to become the subject of this action. He worked out of a common labor pool in the construction department and was assigned on a daily basis to a variety of land-based jobs. On April 1, 1973 Griffith bid into the hot mill labor pool, where as before he was assigned to various jobs on a daily basis. As part of this pool he was assigned to work at the company's barge landing on the river for a total of 3 3/4 days including the date of the accident on May 26, 1973.
>
> On that day, plaintiff was assigned to work with the barge crew at the landing to assist in the loading of two barges. The barge on which the accident was to occur, No. 2730, was owned by defendant-appellant American Commercial Lines, Inc. (American). Three days earlier, on May 23, it had been delivered to Wheeling and was incorporated into the latter's "coal fleet" to await future use. On May 25, No. 2730 was relocated next to the seawall at the barge landing to take on a load of sheet steel which was destined to move down river to Louisville, Kentucky. A second barge, described as a pipe barge, was positioned next

to No. 2730, and it too was to be loaded. The pipe barge was positioned immediately next to the seawall, and No. 2730 was lashed alongside further out on the river.

On the morning of the day of the accident, Griffith and the regular rivermen in the barge crew first loaded pipe into the pipe barge. During the loading of the pipe barge, which was completed before noon, Griffith worked on the seawall and barge. No. 2730 was then moved into position for loading by a procedure known as "rounding" in which a crane on the seawall pushed the barges away from the wall permitting the current to turn the boats around in the water so that No. 2730 was situated next to the seawall. Griffith's sole assistance during the procedure involved his throwing ropes from one barge to the other.

The crew then turned to the loading of No. 2730. At that time, Joseph Allfree, the crew's foreman, who was employed as river foreman by Wheeling, became aware that the barge covers were difficult to move. The wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent. At about 2:00 p.m. Allfree directed the crew to stop loading the barge and to close the covers. Allfree then returned to his office away from the area. The only other experienced riverman on the crew, Joseph Armstrong, then had difficulty closing one of the covers. A cable was attached from the

> crane on the seawall to the cover to pull it shut; a second cable was attached to an adjacent cover for leverage. Because eyelets on the stuck cover were missing, the hook at the end of the cable was attached to the lip on the underside of the cover. Both Armstrong and plaintiff were standing on top of the stuck cover when tension was applied to the cable. As the stuck cover began to rise they stepped back onto an adjacent cover, but that cover moved backward and the two men fell into the hold and both were injured.

521 F.2d at 34-35.

II. GRIFFITH'S APPEAL

Griffith's appeal contests the reduction of his recovery to $156,974.60. Griffith's §905(b) claims were against the barge owner, American, on the theory that it had negligently furnished Wheeling a defective barge, and against Wheeling as owner pro hac vice for negligently directing him to work on that unsafe barge. As noted, the trial court found in Griffith's favor on both of these claims. Both Wheeling and American

contest liability to Griffith, and their contentions are addressed in Parts III and IV below. But neither contests the district court's finding of fact that Griffith suffered $209,299.45 in compensatory damages. Nor does either contend that Griffith, himself, was guilty of any negligence which contributed to the accident. In this Part we address the reduction of Griffith's damages on the assumption that the trial court's liability determinations in Griffith's favor are correct.

The court found that American was negligent in delivering a barge with defective cover mechanisms, knowing that workers such as Griffith would be exposed to risk of injury for those defects. It found that Wheeling, in its capacity as owner pro hac vice of the barge, was negligent in failing to give adequate instructions to steelworkers unfamiliar

with river work, in providing a defective barge for such work, and in failing to inspect, repair, or reject the defective barge. It also found that in its stevedoring capacity, as distinguished from its capacity as owner pro hac vice, Wheeling was liable for the negligence of its employees, Griffith's fellow servants. The court allocated the responsibility for Griffith's injuries 50% to American, 25% to Wheeling as owner pro hac vice, and 25% to Wheeling as stevedore. It then applied what has become known as the equitable credit doctrine to reduce Griffith's total recovery by 25%, representing the negligence attributable to his employer, Wheeling, acting in its capacity as stevedore.

In adopting the equitable credit doctrine the trial court decided the question which this court expressly reserved in Marant v. Farrell Lines,

Inc., 550 F.2d 142, 147 (3d Cir. 1977). The theory behind that doctrine was that when Congress in the 1972 Amendments to the LHWCA eliminated the shipowner's strict liability to longshoremen for unseaworthiness, and at the same time created in §905(b) a new negligence cause of action against the shipowner, it did not intend to impose liability upon the shipowner for that part of the longshoreman's damages attributable to the negligence of the longshoreman's employer. The workman's compensation remedy was said to cover that percentage of the damages. This statutory compensation was characterized as equitable in recognition of the fact that under §933(c) of the Act the stevedore employer had a lien on the employee's third party recovery. Thus, in the absence of a credit principle, the stevedore might in some cases be fully repaid for its workmen's compensation

payments by the shipowner, although its own employees were significantly responsible for the injury. The shipowner would then be left to bear the burden of the longshoreman's damage recovery, despite its lesser responsibility. It was thought to be equitable to prevent this result by reducing the longshoreman's negligence recovery in proportion to the percentage of the stevedore's negligence.

In Edmonds v. Compagnie Generale Transatlantique, 47 U.S.L.W. 4868 (U.S. June 27, 1979), the Supreme Court reversed an en banc decision of the Fourth Circuit[4] which had applied the equitable credit doctrine to reduce a negligence recovery in a §905(b) action against a shipowner by a percentage equal

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[4] Edmonds v. Compagnie Generale Transatlantique, 577 F.2d 1153, 1155-56 (4th Cir. 1978) (en banc).

to the proportionate fault of the longshoreman's employer. The Court held that Congress did not intend to modify the longshoreman's pre-existing right to recover for his injuries in full against a negligent shipowner, even in cases where the negligence of the stevedore contributed to the injury. Whatever the conduct of the longshoreman's employer, a negligent shipowner is liable for the full amount of the longshoreman's damages. Justice White for the Court recognized that by virtue of the stevedore employer's compensation lien on the employee's third party recovery the Edmonds result may relieve a negligent stevedore even of the burden of statutory compensation payments, 47 U.S.L.W. at 4871, but found that circumstance was not decisive. So much for equitable credit.

Thus unless both Wheeling and American can prevail in their appeal on

liability issues, a judgment must be entered in favor of Griffith against one or both in the full amount of $209,299.45.

III. AMERICAN'S APPEAL AGAINST GRIFFITH

The district court held that American, as owner, had breached its duty to exercise reasonable care by delivering barge No. 2730 to Wheeling with its cover mechanisms rusted, bent, and unlubricated, and with the eyelets on the stuck hatch cover completely missing. The court concluded that "[d]elivery of such a barge, with knowledge that many workers would necessarily come into contact with the deteriorated barge covers, was inexcusably negligent." 452 F. Supp. at 845.

In reaching this conclusion, the trial court considered at some length the applicable standard of care. It recog-

nized that some prior cases[5] had relied upon §§343-343A of the Restatement (Second) of Torts (1965), dealing with the liability of landowners and occupiers, as defining the standard of care applicable to vessel owners under §905(b) of the Amendments.[6] It concluded,

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[5] E.g., Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364 (2d. Cir. 1978); Gay v. Ocean Transport & Trading Ltd., 546 F.2d 1233 (5th Cir. 1977); Anuszewski v. Dynamic Mariners Corporation, Panama, 540 F.2d 757, 759 (4th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1098 (1977).

[6] Those sections read as follows:

> §343. Dangerous Conditions Known to or Discoverable by Possessor
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

however, that the application of that formulation would introduce into the maritime torts area distinctions between licensees and invitees which would be inappropriate in the context of commercial shipping. Relying on the Supreme Court's decision in Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), the court discerned an emerging trend in the law toward imposing upon property owners a more general "duty to exercise reasonable care under all the circumstances of the case." 441 F. Supp. at 844. The court also observed that in

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§343A. Known or Obvious Dangers
(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

most cases, including the case sub judice, the same result would be reached whether one applied the Restatement §343 formulation or the more universal duty to exercise reasonable care under all the circumstances. The court therefore concluded that the latter standard was the proper one to apply.

On appeal, American urges that the standard adopted by the district court "leads to an improper imposition of liability in this case and provides no real guidance for the decision of future cases." We are less concerned with the latter objection than with the former, and we conclude that the facts found by the trial court justify imposition of liability on the vessel owner in this case.

A brief review of this court's prior decisions discussing the standard of care under §905(b) will serve as background

for our review of the district court's decision. In Griffith I, supra, we pointed out, first, that the clear intent of amended §905(b) was to relieve vessel owners of absolute liability for injuries to stevedores, whether that liability was imposed on the basis of unseaworthiness or on a respondeat superior theory. 521 F.2d at 40. At the same time, we recognized the apparent intention of Congress "to apply land-based common law negligence principles on a uniform national basis" in actions against the vessel owner under §905(b). Id. at 44 & n.21. We did not at that time undertake to specify the principles to be applied to the record on remand.

This court's subsequent decisions have concentrated upon clarifying the implications of Congress' rejection in §905(b) of strict or respondeat superior liability as a basis for recovery against

the vessel owner. In Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), cert. denied, 430 U.S. 969 (1977), we concluded that §416 of the Restatement (Second) of Torts, which imposes a non-delegable duty of due care upon persons employing a contractor to perform work "dangerous in [the] absence of special precautions" was inconsistent with the intent of Congress to eliminate shipowner liability without fault. Similarly, in Marant v. Farrell Lines, Inc., supra, we reversed a judgment for the longshoreman, because the jury had been instructed that "responsibility for the safety of the longshoreman lies concurrently or jointly" with the stevedore and the shipowner. Relying on Brown, we held that "the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." 550 F.2d at 144 (quoting Brown, supra, 545 F.2d at 860). And in

Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), cert. denied, 434 U.S. 861 (1977), we held that §§318 and 416-429 of the Second Restatement were inapplicable in a §905(b) action, again on the basis that each would have resulted in the imposition upon the shipowner of liability without fault. We held that §414 of the Restatement, which permits imposition of liability upon a principal who retains control over some part of the work performed by an independent contractor, and who fails to exercise that control with responable care, might provide a proper basis for liability under §905(b), but concluded that the plaintiff had failed to introduce sufficient evidence of the shipowner's control over the stevedore's operation to support a recovery. 554 F.2d at 1252.

Rich v. United States Lines, 596 F.2d 541 (3d Cir. 1979), relied on by

American at oral argument, continues the pattern of our earlier decisions. In Rich the plaintiff longshoreman was injured when he slipped on sheet ice which had accumulated on top of containers stacked on board the defendant's vessel. The panel first held that plaintiff's evidence was insufficient as a matter of law to support liability under §414 of the Restatement. Id. at 550. The plaintiff, relying upon the legislative history of the Amendments, also argued that the shipowner had breached its duty to provide a "safe place to work" by failing to take appropriate corrective action, despite its knowledge of the dangerous ice conditions. In a discussion closely tailored to the facts of the case, the panel majority rejected this contention on the ground that the plaintiff had failed to establish that the ice covered containers were a part of

the ship for whose condition the shipowner was customarily responsible. In the panel's view, the evidence in the case showed "beyond a doubt" that the stevedoring company, rather than the vessel, was "in complete charge of the details of the handling of the containers." Id. at 557. (emphasis added). To impose liability on those facts the court concluded, would "amount once again to the establishment of a non-delegable duty." Id. at 556 (citing Hurst v. Triad Shipping, supra, 554 F.2d at 1251). The panel majority's view of the case made it unnecessary for them to consider the standard of care issue.

These decisions firmly establish that under §905(b):

> The vessel has no general duty continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations

(at least when the vessel has no knowledge of the dangerous conditions).

Rich v. United States Lines, Inc., supra, 596 F.2d at 560 (Garth, J., concurring) (footnote omitted). They do not, however, speak directly to the scope of the vessel's independent duty under §905(b) to "exercise the same care as a land based person in providing a safe place to work."[7]

American presents two arguments against the standard of reasonable care under all the circumstances applied by the district court. First, it argues that a vessel should not be held liable in negligence under §905(b) if it has delivered the ship "in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to en-

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[7] H.R. Rep. No. 92-441, 92d Cong., 2d Sess, reprinted in [1972] U.S. Code Cong. & Admin. News 4698, 4704 [hereinafter cited as House Report].

counter" will be able to load or unload the vessel safely by exercising "ordinary care under the circumstances."* Alternatively, American urges this court to adopt the standard of care established in Restatement (Second) §§343-343A to govern all actions under §905(b).

We reject both suggestions. Under American's first proposed standard of care the vessel would be relieved of liability to a longshoreman for unreasonably dangerous conditions on board ship whenever the stevedoring contractor failed to perform his tasks in an "expert and experienced" fashion. This would occur whether or not the individual longshoreman was personally at fault. The proposed rule thus imputes to the

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* American Brief at 14 (quoting Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal. 1959), aff'd sub nom., Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.), cert. denied, 363 U.S. 803 (1960).

non-negligent longshoreman the negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in Edmonds v. Compagnie Generale Transatlantique, supra. It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to reduce his recovery against a negligent shipwoner, would approve a rule barring all recovery against a negligent shipowner on the basis of imputed employer negligence. We do not hold that the likelihood of negligent conduct on the part of the stevedoring contractor is always irrelevant in determining whether the vessel has breached its duty of due care. Compare Restatement (Second) of Torts §302A[9] with id. §302. But the

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[9] Section 302A reads:

> An act or omission may be negligent if the actor realizes or should

fact that the stevedore has been negligent cannot be automatically decisive of that question.

Similarly, we cannot agree that §§343 and 343A of the Second Restatement define for all cases the appropriate standard of care under §905(b). It is true, as American points out, that we have approved reference to the Restatement (Second) in §905(b) negligence actions "as the national expression of non-maritime tort principles." Hurst v. Triad Shipping Co., supra, 554 F.2d at 1248; Brown v. Ivarans Rederi A/S, supra, 545 F.2d at 863. But as Hurst itself illustrates, those provisions are adopted only when they are consistent with Congressional intent in enacting §905(b). Sections 343 and 343A do not meet that

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realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

standard. Both sections would apparently relieve a vessel owner of all liability for an unreasonably dangerous condition on board ship if the invitee longshoreman has failed to exercise ordinary care in dealing with that danger, on the theory that a negligent invitee has assumed the risk of injury. See §343A, Comment e. As we stated in Hurst, 554 F.2d at 1250, Brown, 545 F.2d at 863-64 n.10, and Rich, 596 F.2d at 551 n.21, that principle is inconsistent with the clearly stated intention of Congress to abolish the doctrines of contributory negligence and assumption of risk in cases decided under §905(b).[18]

More fundamentally, we think that it would be unwise to assume that the principles of negligence law applicable to owners of land will in all cases pro-

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[18] See House Report, supra n.7, [1972] U.S. Code Cong. & Admin. News.

vide an appropriate "land based" standard of care for actions against a vessel owner. In some cases the analogy will be appropriate. In other cases, different portions of the Restatement, including, for example, the duty of care owed by a supplier of a chattel in commerce, may provide a more appropriate standard of reference. Compare Restatement (Second) of Torts §§388-389. Indeed, it might persuasively be argued that it was the latter duty which was breached in this case. Moreover, we agree with the district court that insofar as the standards of liability in §343 and 343A are colored by traditional economic and social attitudes uniquely associated with land ownership, wholesale importation of those sections into §905(b) might be confusing and counterproductive. See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Santos v. Scindia Steam

Navigation Co., 598 F.2d 480, 486-88 (9th Cir. 1979); Gallardo v. Westfal-Larsen & Co. A/S, 435 F. Supp. 484, 493-95 (N.D. Cal. 1977); Espinoza v. United States Lines, Inc., 444 F. Supp. 405, 409-12 (S.D. N.Y.), aff'd, 586 F.2d 832 (2d Cir. 1978); G. Gilmore & C. Black, The Law of Admiralty 453-54 (2d ed. 1975).

The sounder approach, we think, is to recognize that §905(b) imposes on vessel owners the same duty to exercise "reasonable care under the circumstances of each case" that would be applicable to a land based business. Accord, Santos v. Scindia Steam Navigation Co., supra, 598 F.2d at 485-88; Gallardo v. Westfal Larsen & Co. A/S, supra, 435 F. Supp. at 496. See Kermarec v. Compagnie Generale Transatlantique, supra, 358 U.S. at 632; Brown v. Ivarans Rederi A/S, supra, 545 F.2d at 863. Cf. Restatement (Second) of Torts §§281-83, 302A, 305, 452. Proceed-

ing from this broad common law standard, federal courts may develop on a case by case basis a uniform federal law of negligence, referring for guidance to the "land based" standards of care established in the Restatement (Second) of Torts whenever such reference accords with the Congressional intent and is helpful to decision of the case at hand.

At a minimum, we think that the standard of reasonable care under the circumstances would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the

longshoremen against that danger. See Santos v. Scindia Steam Navigation Co., supra, 598 F.2d at 485.[11]

Reviewing the record in this case, we think that the district court's application of the standard of reasonable care under all the circumstances of this case touched all of these bases. Certainly, there was ample evidence to support the court's conclusion that American knew or should have known of the rusted, decrepit condition of the covers on barge 2730, and that American failed to exercise reasonable care to correct that condition. American does not argue otherwise. Rather the substance of American's argument is that the evidence was insufficient to show that it knew or should have known that the condition of the barge

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[11] Compare Restatement (Second) of Torts, §§343(a)-(c); Id. §§388(a) and (c).

posed an unreasonable risk of harm to longshoremen in Griffith's position. Specifically American contends that the difficulty with the stuck covers was obvious and could have been solved without danger to anyone, and that therefore American should not have been required to anticipate that Wheeling would attempt to overcome the defect in the covers by the unsafe method to which it resorted.

In pressing this argument American attacks both the factual and legal findings of the court below. American points factual and legal findings of the court below. American points to the district court's reference to missing eyelets to which the hook which Griffith was holding could have been attached, and argues that that finding is clearly erroneous. In fact, the record shows that there were two eyelets on the covers, one close to each side of the barge (Exhibit D2). But

the uncontradicted trial testimony was that Wheeling's employees had tried ten or twenty times without success to unstick the barge covers by attaching cables to those eyelets. (224a-225a; 313a-314a). The missing eyelets to which the court referred would have been at the center of the covers, where they could have been grasped in a balanced manner by the crane cables. Because such eyelets were missing or had never been installed, Wheeling's employees had to remain on the cover, holding the cable hooks under the rim of the cover, while tension was applied.

American also argues that there were alternative methods available to Wheeling-Pittsburgh by which the covers might have been moved safely, which it was entitled to assume that Wheeling would rely upon. One safe alternative method which American suggests is the use of the

outboard eyelets on the covers, a method which the testimony discloses was tried and which, due to the defective condition of the barge, proved ineffective. William Toutant, the designer of barge No. 2730, also testified that with the use of a four part sling the covers, which weigh over nine thousand pounds, could have been lifted off safely. (393-a). But Frank Merritt, an American employee, was aware, before barge No. 2730 was furnished to Wheeling, that at Allenport Wheeling regularly used the double cable method of moving stuck barge covers. (41a). Thus when American furnished barge No. 2730 it knew or should have known that the combination of the unlubricated, rusty and bent track mechanism and the missing center eyelets would expose Wheeling's longshoremen to the precise sort of risk to which Griffith was exposed. The fact that Wheeling's

chosen method of operation may have been negligent is therefore of no help to American.[12]

The record before the district judge contained substantial evidence that American knew of the condition on board its vessel; that it knew or should have known that that condition posed an unreasonable risk to workers in Griffith's position; and that it failed to correct that condition. On this record, then, we hold that the district court's findings of fact with respect to American's liability to Griffith are not clearly erroneous, and that its application of a general standard of reasonable care in the circumstances was not legal error.

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[12] See Restatement (Second) of Torts §302 quoted supra at n.9.

IV. WHEELING'S APPEAL AGAINST GRIFFITH

Wheeling does not contest that, if it was properly held to be an owner pro hac vice, it was guilty of negligence in that capacity. But it contends that the judgment against it in favor of Griffith must be reversed because as a matter of law it is not an owner pro hac vice. An appreciation of that argument requires an examination of the complex procedural history of this case. As we indicated above, the trial court in 1974 granted Wheeling's motion for summary judgment against Griffith. In doing so it accepted Wheeling's argument that even assuming its alleged status as an owner pro hac vice, the LHWCA precluded liability against it in favor of an employee. 384 F. Supp. at 237. Since that legal theory rendered its ownership status immaterial, Wheeling argues, it did not file affidavits contesting that status in support

of its motion for summary judgment. On appeal this court, accepting as undisputed Wheeling's exclusive though temporary control of barge No. 2730, rejected its legal position that the LHWCA barred recovery against it as an owner pro hac vice. As we explained: "Wheeling concedes that it might be found to be an 'owner pro hac vice' as that term has been applied in this circuit." 521 F.2d at 39-40 (footnote omitted). Thus, our reversal of summary judgment in Wheeling's favor established no more than that based on the pleadings, affidavits, and discovery materials then on file, a factfinder could find Wheeling to be a pro hac vice owner within the meaning of Blair v. United States Steel Corp., 444 F.2d 1390 (3d Cir. 1971) (per curiam), cert. denied, 404 U.S. 1018 (1972).

Wheeling now points out that there is substantial additional evidence in the

record concerning its relationship to barge No. 2730 which was not of record at the time of the summary judgment. That evidence, it contends, establishes that it was not a pro hac vice owner as defined in Blair. It contends, moreover, that the trial court, in misplaced reliance on the law of the case doctrine, disregarded that additional evidence in holding it liable. Finally, it contends that even if the Blair standard as to pro hac vice ownership has been met, that case should be overruled.

When the case was first before us it was undisputed, and still is after trial, that barge No. 2730 was delivered to Wheeling's Allenport landing by a river boat company, and incorporated into a fleet there under the supervision of Joseph Allfree, Wheeling's river dock foreman. From the time Wheeling received the barge until the time of the accident

it had exclusive possession. All movements of the barge while it was in Wheeling's possession were the responsibility of Wheeling's employee rivermen. Their duties included placing lights on the barges moored with Wheeling's fleet and moving them about the landing to facilitate loading. Barge No. 2730 was one of a number furnished to Wheeling for transportation of its products, and it was free to chose which among them it would use. These undisputed facts fit squarely with the Blair holding. Wheeling does not contend that any available evidence bearing on its relationship to barge No. 2730 was excluded at trial. Rather, it points to additional evidence introduced at trial, as follows:

> [Wheeling] could load only material destined for a pre-determined port (350a); the charter between [Wheeling] and American was oral rather than written (7a, 337a, 566a); Barge 2730 could have been removed by American for repairs without [Wheeling's] prior permis-

> sion (355a-356a); [Wheeling] was not responsible for rent on American barges which were unavailable due to repair (358a); [Wheeling] paid American for Barge 2730 according to tonnage shipped rather than type of barge used (449a, 564a); [Wheeling] had nothing to do with the route or time which Barge 2730 took to arrive at its final destination (565a, 349a); and [Wheeling] could not move Barge 2730 from its landing without [American's] consent and without the assessment of an additional fee. (354a, 358a) (ICC Waterways Freight Tariff, 8-B, Items 420-435)

Wheeling's Brief in No. 76-2160 at 12. Wheeling argues that because the trial court relied on the law of the case doctrine it disregarded this trial evidence. Because the record is not clear on this issue, we must remand for further factual findings.

The trial court found after trial that:

> The status of [Wheeling] as owner pro hac vice at the time of the injury is well established under both the law of the case and the applicable case law.

425 F. Supp. at 845 (emphasis supplied). Since evidence on the issue of Wheeling's relationship to barge No. 2730 was received, and the court nowhere denied considering it, the quoted language could be understood as a finding upon all the evidence presented, that Wheeling fell within the definition of pro hac vice owner announced in Blair and in Griffith I. On the other hand, it may be read as rleying solely on the holding in Griffith I to determine the issue of ownership status. There are a number of indications in the record that the district judge may well have erroneously viewed our decision in Griffith I as foreclosing any factual inquiry into Wheeling's ownership status on remand. See 340a; 341a; 342a. Because we are unable to determine from the record whether the district judge actually considered the further evidence bearing on ownership

status submitted by Wheeling, and because Wheeling was entitled to have the district judge pass on that evidence before he determined its ownership status, a remand is required for further findings of fact on that issue.

We reject, however, Wheeling's further contention that Blair and Griffith I should be overruled. In the first place that would require action by the court in banc. Nor is this panel persuaded that the Blair holding should be reconsidered.[13] Wheeling argues that the holding imposes an inconvenience upon barge users who operate their own land-

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[13] Judge Weis believes that Blair should not be extended but should be limited to its facts, and that the burden of establishing a demise charter rests upon the owner of the vessel. See Guzman v. Pirchirilo, 369 U.S. 698 (1962); Leary v. United States, 81 U.S. 607, 612 (1871); Dobbins v. Crane, 567 F.2d 559 (3d Cir. 1977); Fitzgerald v. A. L. Burbank, 451 F.2d 670, 676 (2d Cir. 1971); Miller v. Union Barge Line Corp., 299 F. Supp. 718 (W.D. Pa. 1969).

ings and perform their own stevedoring. That may be, but such barge customers also undoubtedly obtain substantial cost and convenience advantages from doing so. If the barges remained in the possession and control of an owner's crew, that crew would supervise use of the barge at the landing and might possibly guard against injuries to longshoreman invitees. But the bargeline customer would be charged accordingly. When that customer chooses to take exclusive possession and control of a barge in navigation, even for a limited time and in a limited space, it should, as we have held, be obliged to discharge the responsibilities of an owner. Another experienced admiralty court agrees. See Eskine v. United Barge Co., 484 F.2d 1194 (5th Cir. 1973).

Wheeling also contends that the trial court erred in finding that it was negligent, in its capacity as owner pro

hac vice, in failing adequately to train steelworkers unfamiliar with river work. That contention bears upon the allocation of liability between Wheeling and American. It does not, however, affect Wheeling's liability to Griffith, since findings that Wheeling was negligent as owner pro hac vice in providing a defective barge, and in failing to inspect, repair or reject it, are not challenged as factually or legally erroneous.

Thus we hold that the judgment of liability in favor of Griffith against Wheeling as owner pro hac vice must be vacated and remanded for further findings regarding Wheeling's status as owner.

V. WHEELING'S APPEAL AGAINST AMERICAN

A. Indemnification

Wheeling also appeals from the district court's rejection of its claim against American for indemnification.

While a factual finding in the district court that Wheeling was not an owner pro hac vice would moot this claim, we think that in light of the possibility that the issue of contribution or indemnity is not foreclosed by our remand, resolution of this question is proper on this record.

Wheeling contends that when a demise charterer-an owner pro hac vice-and an owner are both found to be negligent with respect to any injury-causing defect, the negligence of the owner in supplying the defective barge is active or primary, while that of the owner pro hac vice, in failing to discover and remedy the defect is passive or secondary. A tortfeasor who is only secondarily or passively negligent, it urges, is entitled to indemnification for any loss occasioned by the primary or active negligence of

another. It points out that such a non-contractual duty by a primary or active tortfeasor to indemnify a secondary or passive tortfeasor has been recognized both by Pennsylvania law, e.g., Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368 (1951); Tromza v. Tecumseh Products Co., 378 F.2d 601 (3d Cir. 1967), and in maritime cases. E.g., Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co., 410 F.2d 178 (5th Cir. 1969); Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F.2d 182 (2d Cir. 1929).

We reject at the outset Wheeling's suggestion that rights of indemnity and contribution between maritime joint tortfeasors should be governed by state law. Consistent with the intent of Congress in enacting the 1972 Amendments, we think that whatever rule is adopted should be uniform and federal. Brown

v. Ivarans Rederi A/S, supra, 545 F.2d at 861-63; Griffith I, supra, 521 F.2d at 44 & n.21. Moreover, while we recognize that the federal cases cited by Wheeling might once have had some force, we think that the law of maritime indemnity has been substantially altered by the Supreme Court's decision in United States v. Reliable Transfer Co., 421 U.S. 397 (1975). In that case the Court abandoned the traditional rule of "divided damages" for maritime collision cases. That rule required "the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their fault may have been." 421 U.S. at 397. In the future, the Court held, collision damages should be apportioned on a comparative fault basis. The rationale behind that decision was simple: allocation of liability directly in proportion to fault

was a much fairer method of determining damages than the rough and ready 50-50 division imposed by the traditional rule.

The rule of non-contractual indemnity pressed by Wheeling, like the contribution rule at issue in Reliable Transfer, is designed to shift the primary burden of reparations to the party more at fault, thereby avoiding unjust, or at least unsatisfactory results. But the rule performs that task by relieving a concededly negligent tortfeasor-albeit his negligence was "passive"-from any liability for the damage that occurred. That result seems strongly at odds with the preference for comparative fault expressed in Reliable Transfer. A similar rule, formerly applied in maritime collision cases, held that when one ship's negligence was "major," and the other's "minor," the grossly negligent party could be held solely at fault.

E.g., The City of New York, 147 U.S. 72, 85 (1893). The Reliable Transfer Court dismissed this rule as "inherently unreliable" and unfair. "That a vessel is primarily negligent does not justify it shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." 421 U.S. at 406. Similarly, we can see no good reason why in this non-collision maritime context the fact that Wheeling's conceded negligence as owner pro hac vice may have been less egregious than that of American should justify the creation of a right of indemnity which would impose sole responsibility for the accident on American, while allowing Wheeling to go scot-free. In Griffith I, supra, we suggested that the preferable approach would be to apply the comparative fault principles endorsed in Reliable Transfer to achieve an equitable appointment of liability between the

two alleged joint tortfeasors. The district court applied those principles here, and we affirm that application.

Thus we hold that the district court properly rejected Wheeling's claim that it should be fully indemnified by American for its liability to Griffith.

B. Percentage of Negligence

The trial court, as we noted above, entered judgment against Wheeling for $52,324.87 and against American for $104,649.73, because it held that Wheeling as owner pro hac vice was responsible for 25%, and American for 50% of the total damages of $209,299.45. In Part I we held that it was improper to diminish Griffith's recovery by a percentage equal to Wheeling's stevedore negligence. If the court determines on remand that Wheeling is an owner pro hac vice, the defendants are jointly and severally liable under §905(b) for the full amount

of Griffith's damages. That holding would require a redetermination of the amount for which each defendant is liable. According to the district court, negligence actionable under §905(b) produced 75% of the damages, of which 50% was attributable to American and 25% to Wheeling. The court's findings suggest that on remand contribution in the ration of two thirds-one third would be appropriate. Thus, if the findings upon which the 50%-25% allocation was based were sustainable it would be a simple matter to calculate the contribution of each defendant toward the $209,299.45 joint liability.

Unfortunately, however, we are not in a position to make that simple calculation. As we noted above, the trial court predicated its finding of negligence by Wheeling as owner pro hac vice in part on Wheeling's "[f]ailure to give

adequate safety instructions to steelworkers unfamiliar with river work." 452 F.2d at 845. Wheeling notes that there is a serious problem of proximate cause with respect to that finding, since in the same accident which injured the untrained Griffith, his supervisor, Joseph Armstrong, a well-trained and experienced riverman, was also injured. More fundamentally, Wheeling observes, and we agree, that on this record, its failure to train Griffith and his fellow servants was, insofar as it contributed to his injuries, a failure to train them in longshoreman skills. That failure must as a matter of law be attributed to Wheeling in its capacity as a stevedore rather than as an owner pro hac vice. "The only negligence of [Wheeling] which could properly be ... attributed to Wheeling [as owner pro hac vice] was its negligence in failing to inspect, reject,

or correct [b]arge 2730." Appellant's Brief in No. 78-2160 at 25. Since the trial court did not disclose to what extent its finding of 25% culpability was attributable to Wheeling's failure to train, we cannot recalculate the allocation between Wheeling and American for purposes of contribution. A remand is necessary so that the trial court can make that determination, excluding from the calculation Wheeling's negligence in failing to train.

VI. AMERICAN'S APPEAL AGAINST WHEELING

American objects to the allocation of liability between it as owner and Wheeling as owner pro hac vice on the basis of 50%-25%. It urges that since the duties of an owner and an owner pro hac vice are the same, their liabilities should be the same unless some special

circumstance alters the balance. We readily grant that the duties to third parties of an owner and an owner pro hac vice are the same, with respect to the condition of the vessel. Both are required to exercise reasonable care under all the circumstances of the case. But it does not follow that because their duties are the same and each breached those duties in some manner their liability inter sese for a joint tort should be the same. What we have said in Part V-A. above about the applicability of the principles of Reliable Transfer is equally applicable here. When two acts of negligence concur in causing injury, contribution should be allocated on a comparative fault basis. The trial court heard the testimony and made a factual determination as to comparative fault which, except to the extent discussed in Parts IV and V-B. above, we cannot find

clearly erroneous. Our decision in Part V-B. above requires a redetermination of the percentage of contribution, excluding one of the factors on which the trial court relied.

CONCLUSION

The judgment appealed from will be modified so as to provide that American as owner is jointly liable to Griffith for $209,299.45. The judgment will be vacated, insofar as it determines that Wheeling was liable as an owner pro hac vice, and the case remanded for a redetermination, on all the evidence presented, of Wheeling's ownership status. If Wheeling is held to be an owner pro hac vice, then the court should redetermine the liability of each defendant consistent with Part V-B. of this opinion. Costs shall be taxed in favor of Griffith against American, but Wheeling and Ameri-

can shall between themselves each bear their own costs.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH

v.

WHEELING-PITTSBURGH STEEL
CORPORATION, et al.

THOMAS F. GRIFFITH,
Appellant in No. 78-2159

WHEELING-PITTSBURGH STEEL
CORPORATION, Appellant in No. 78-2160

AMERICAN COMMERCIAL LINES, INC.
Appellant in No. 78-2161

(D. C. Civil No. 73-0706)

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above matter filed August 24, 1979, be and is hereby amended as follows:

Page 15, Second Paragraph, second, third and fourth line now reads:

> factual and legal findings of the court below. American points factual and legal findings of the court below. American points to the district

court's reference to missing. . . .

The underscored sentence should be deleted and it should now read:

> factual and legal findings of the court below. American points to the district court's reference to missing. . . .

By the Court,

JOHN J. GIBBONS
Circuit Judge

Dated: October 3, 1979

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 80-1641

WILLIAM McCARTHY

v.

SILVER LINE, LTD. and SILVER BULK SHIPPING, LTD.

Silver Bulk Shipping, Ltd.,

Appellant

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
C. A. No. 78-1484

Argued December 5, 1980

Before: ADAMS, GARTH and SLOVITER,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THE COURT,

_____
Circuit Judge

ATTEST:

_____
Chief Deputy Clerk

DATED: December 12, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2076 and 79-2077

LAWRENCE A. SARAUW
Appellant in No. 79-2077

v.

OCEANIC NAVIGATION CORPORATION
and VLCC ANDREAS ATLAS,

Oceanic Navigation Corporation
and VLCC Andros Atlas,
Cross-Appellants in No. 79-2076

ON APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS

C. A. NO. 78-0057

Argued April 22, 1980

Before: ADAMS, MARIS and SLOVITER,
Circuit Judges

(Filed May 20, 1980)

ROBERT B. WHITE, JR. (Argued)
Rawle & Henderson
Philadelphia, Pennsylvania
Attorneys in No. 79-2076

Of Counsel:
JOHN F. JAMES
James & Resnick
Christiansted. St. Croix
U. S. Virgin Islands

JOSEPH L. COSTELLO (Argued)
Christiansted, St. Croix
U. S. Virgin Islands
Attorney in No. 79-2077

OPINION OF THE COURT

ADAMS, Circuit Judge

Lawrence A. Sarauw, an employee of Hess Oil Virgin Islands Corporation (Hess), commenced this action in the District Court of the Virgin Islands against Oceanic Navigation Corporation (Oceanic), the owner of the vessel VLCC ANDROS ATLAS, pursuant to § 18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (1972 Amendments), 33 U.S.C. §905(b).[1] Sarauw sought damages for injuries sus-

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[1] That section provides:

> In the event of inuury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

tained on November 15, 1977, allegedly as a result of the negligence of Oceanic and Hess, when the gangway to the ANDROS ATLAS fell while he was ascending it.

Following a four day trial, the case was submitted to the jury on special interrogatories. In answering these interrogatories the jury found (1) that Oceanic was negligent and its negligence was the proximate cause of Sarauw's injuries; (2) that Sarauw himself was negligent and was 25% at fault; (3) that Hess, the stevedore-employer, was negligent and its percentage of fault was 25%; and (4) that Sarauw's total damages were $190,800.00.[2] Judgment was entered

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[2] These damages were also submitted on special interrogatories, and the jury found as follows:

$ 7,000.00	Medical Expenses
8,800.00	Lost Income Past
-0-	Lost Income Future
100,000.00	Pain and Suffering
25,000.00	Loss of Enjoyment of Life
50,000.00	Permanent Disability/ Disfigurement
$190,800.00	Total Damages

for Sarauw, but the court reduced the damage calculation by 25% for Sarauw's negligence,[3] and by another 25% for the negligence of Hess.

Both parties appealed. Sarauw claims that the 25% reduction because of the negligence of Hess is error. Oceanic contends that it was error to deny its post-trial motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Oceanic asserts

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[3] The trial judge and the parties refer to this reduction as being for "contributory" negligence, but that term was not used in the interrogatories and it is clear that "comparative" negligence was meant. Sarauw does not challenge this reduction for negligence attributed to his own fault. Cf. Rich v. United States Lines, Inc., 596 F.2d 541, 565 & nn.32-33 (3d Cir. 1979) (Garth J., concurring) (suggesting applicability of comparative negligence doctrine); H. R. Rep. No. 92-1441, 92nd Cong., 2d Sess., reprinted in [1972] U.S. Code Cong.&Ad. News 4698, 4705 ([T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employer's own negligence may have contributed to causing the injury.")

in support of its appeal from the denial of its motion for judgment n.o.v. that no duty of care was owed by it to Sarauw to provide a safe gangway and that, even assuming such a duty, there was insufficient evidence to establish a breach of that duty. In support of the appeal from the denial of the new trial motion, Oceanic contends that the trial court incorrectly instructed the jury on the duty of care, and that the listing of pain and suffering, disfigurement, and loss of life's pleasures as separate components of damages in the special interrogatories was plain error.

We reject each of Oceanic's contentions and, accordingly, affirm the denial of its post-trial motions. Sarauw's appeal, though, is, as Oceanic concedes, clearly meritorious on the basis of Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S. Ct. 2753,

61 L. Ed.2d 521 (1979), handed down after the entry of judgment in this case by the district court. We shall therefore vacate the judgment and remand with instructions to restore that portion of the verdict that was decreased because of Hess's negligence.

I. FACTS

Sarauw was employed as a dock helper for Hess, which had the responsibility of unloading the ANDROS ATLAS. The vessel had arrived at Hess's No. 3 dock at St. Croix, U. S. Virgin Islands, to discharge a cargo of crude oil. When the vessel first arrived, a small gangway going from the ship to the dock was put in place by Hess personnel. At about 2:30 a.m. on November 15, 1977, Sarauw observed that the tanker had risen in the water to a point where the small gangway had to be replaced with a longer one. While operat-

ing the pier-side crane to swing the longer gangway into position, Sarauw observed that a chain railing was in place on the edge of the vessel's deck where he wanted to secure the head of the longer gangway. After failing to attract the attention of anyone aboard the ship, Sarauw descended from the crane and started up the small gangway which had not yet been removed from the ship's side. When he was part of the way up, the small gangway suddenly came loose from the tanker's side; Sarauw and the gangway fell to the dock, and he was seriously injured.

The small gangway, owned by Hess, has a four inch angle iron welded to its underside. The angle iron fits over a lip at the edge of the ship's deck. This interlocking arrangement was designed to prevent the gangway from rolling away as

the vessel rises in the water. Additionally, the head of the gangway is equipped with chains and ropes that are tied to stanchions or padeyes on the deck in order to secure the gangway in the event the angle iron interlock becomes dislodged. It was undisputed that the gangway was not, at the time it fell, fastened to any stanchions or padeyes.

II. OCEANIC'S APPEAL

A. The Denial of its Motion for Judgment Notwithstanding The Verdict.

1. The Existence of a Duty.

Oceanic maintains that under the controlling principles of vessel liability to longshoremen under the 1972 Amendments, as enunciated in three recent decisions of this Court, it owed no duty to Sarauw as to the safety of the gangway. See Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.), cert. denied,

434 U.S. 861 (1977); Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979); and Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979).

In Hurst, we concluded that because the 1972 Amendments abolished unseaworthiness as a basis of liability, all species of liability without fault were abolished as well, including the doctrine of nondelegable duties. 554 F.2d at 1246-47. This Court recently observed that Hurst and Rich "firmly establish" that

> "the vessel has no general duty [under §905(b)] continually to supervise the activities of the stevedore, to assume responsibility for the stevedore's equipment, or to assume responsibility for dangerous conditions in the vessel created by the stevedore during the course of its operations (at least when the vessel has no knowledge of the dangerous conditions)."

Griffith, 610 F.2d at 124 (quoting Rich, 596 F.2d at 560 (Garth J., concurring)).

From these principles, Oceanic argues that the line of vessel liability

has been drawn on the simple basis of determining who owns the equipment involved in the injury. Oceanic likens the ownership of the gangway in this case to the ownership of the crane causing injury in Hurst, which we held to be the exclusive responsibility of the stevedore.

A careful examination of the three principal cases cited by Oceanic reveals that our linedrawing has not been so simplistic. It was not ownership of the crane, but the degree of control over its operation, that was determinative in Hurst. See 544 F.2d at 1251-52. Retained control was also the critical factual issue in Rich. See 596 F.2d at 550. As explained in Griffith, the evidence in Rich "showed 'beyond a doubt' that the stevedoring company, rather than the vessel, was 'in complete charge of the details of handling of the containers [on which the injury occurred].'" Griffith, 610 F.2d at 124 (quoting, with emphasis added, Rich, 596 F.2d at 557).

In Hurst, some cables slipped off a hook at the end of a crane, operating without a safety catch, while the crane was being used to hoist cargo from the ship's hold. The crane from which the hook was appended was land-based and was the means by which the ship was unloaded. Unloading the ship was the primary function of the stevedore, and the crane was an integral part of that operation over which the vessel owner had no control. In contrast, the gangway here was not in the exclusive control of the stevedore. Here, although the stevedore owned the gangway, the vessel owner did not surrender control over the manner in which the gangway was to be secured. Since the ship customarily retains that control, to posit a duty on the basis of it does not amount to reimposition of strict liability and the warranty of seaworthiness.[4]

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[4] Prior to the 1972 Amendments, courts had established a vessel's abso-

As the trial judge concluded, sufficient evidence was adduced in this case to

> establish a duty on the part of the shipowner and crew to secure and maintain the gangway. Plaintiff's expert, Captain David James, testified that good seamanship requires that the ship officers and crew

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lute duty of care with regard to the gangway because, as part of the vessel, it was covered in the warranty of seaworthiness. See e.g., Russell v. City Ice & Fuel Co., 539 F.2d 1318, 1320 n.2 (4th Cir. 1976) (citing cases); Reyes v. Marine Enterprises, Inc., 494 F.2d 866, 869 (1st Cir. 1974) (decided before 1972 amendments were applicable). The abolition of the strict liability concept of seaworthiness, however, does not necessarily import the elimination of any duty with respect to the gangway. Reyes explicitly recognized a claim of negligence against the vessel independent of the warranty of seaworthiness:

> Because the means of ingress or egress, by whomever furnished, are an "appurtenance" of the vessel, the owner has a duty of care regarding them. The owner is thus liable for a negligent failure to inspect a gangway and to warn against defects reasonably apparent from inspection or to take steps to repair or replace it. . . . We hold, therefore, that Romero Reyes was entitled to take his case to the jury on the issues of both unseaworthiness and negligence.

> make certain that the gangway is safely and firmly secured at all times and that a watch be posted in the gangway area as an additional safety precaution. Captain James' testimony as to the duty of the crew of the vessel to secure and maintain the gangway equipment was corroborated by statements to the same effect by the ship's captain and second officer, Captain Thalissimos.

The verdict thus did not rest on an impermissible theory of unseaworthiness

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494 F.2d at 870. The Court of Appeals for the Ninth Circuit recently noted that "[u]nder the former law, some unsafe conditions which supported an unseaworthiness action might also have supported a negligence action." Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 485 (9th Cir. 1979). The congressional committees therefore took care in their reports to head off the fear that the "abolition of the unseaworthiness action might lead some post-Amendment courts to conclude that if a set of facts would have amounted to unseaworthiness, Congress meant to preclude a recovery based on negligence." Id.

or respondeat superior, but on a theory of the vessel's negligence in performing a duty separate from any duty owed by the stevedore. The statute recognizes that a ship may be held liable when it and the stevedore are concurrently negligent. Indeed, "holding the vessel accountable for its negligence, even though the stevedore has been negligent as well, is necessary to effectuate the congressional design of creating an incentive for the vessel 'to exercise the same cargo as a landbased person in providing a safe place to work.'" Rich, 596 F.2d at 560 (Garth, J., concurring); see Griffith, 610 F.2d at 124-25; Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 488-89 (9th Cir. 1979). The standard by which Oceanic is to be judged is of "reasonable care under the circumstances," which

> would permit a finding of negligence upon a showing: (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Griffith, 610 F.2d at 126.

We conclude that Oceanic had a duty of care with respect to the gangway appurtenant to its vessel, notwithstanding that the gangway was owned by the stevedore. Neither the 1972 Amendments nor our previous decisions in Hurst, Rich, and Griffith are to the contrary.

2. The Breach of the Duty.

Oceanic claims that there was insufficient evidence to establish a breach of its duty to maintain the gangway in a safe and secure manner. It argues that the evidence shows that the gangway was

secured when it was initially emplaced at about 7:30 p.m., that the gangway was unsecured when it fell with Sarauw aboard at about 2:30 a.m. the following day, and that there was no evidence as to exactly when the gangway became unsecured. Therefore, contends Oceanic, the jury was left to speculate as to the breach because there was no evidence as to when the gangway became untied that would support a finding of Oceanic's actual or constructive knowledge of the dangerous condition of the gangway.

Our scope of review of a jury verdict is, of course, quite limited. "[W]e must view the evidence," and the inferences to be drawn therefrom, "in the light most favorable to the party which obtained the verdict below." Herman v. Hess Oil V. I. Corp., 524 F.2d 767 (3d Cir. 1975). With this limitation in mind, we note that Oceanic's analysis

overlooks another ground upon which the jury could have found a breach of the duty to maintain a safe and secure gangway.

Sarauw's expert, Captain James, testified that the officer in charge of the ship was responsible for seeing that the gangway was properly secured and that a gangway watch would be the customary method of fulfilling this responsibility. A gangway watch is a competent, sober, and reliable seaman positioned at the head of the gangway to relay communications to the shore and to check that the gangway is secured at all times. Second Officer Thalissimos of the ANDROS ATLAS confirmed that neither of the two seamen in charge of the night watch were in the immediate vicinity of the gangway at the time of the accident. Since the accident occurred because the gangway was unsecured, it would have been reasonable for the

jury to conclude that the gangway watch could have alerted Sarauw of the dangerous condition of the gangway had the watch been properly in place. Moreover, there was no evidence that the gangway lashings broke loose; the evidence is that they simply were not attached at all. Had the gangway watch fulfilled its responsibilities, it should have been aware that the ropes and chains were not tied down. There was therefore ample evidence upon which the jury could reasonably have found a breach of the duty as to the safety of the gangway.

Because Oceanic's duty of reasonable care included responsibility for the safety of the gangway and because there was evidence to support the finding that Oceanic had breached that duty. we conclude that the trial court did not err in denying Oceanic's motion for judgment n.o.v.

B. The Denial of its Motion for a New Trial

1. The Jury Instructions.

Oceanic argues that the trial court should have granted a new trial because its instructions on the standard of care based on the Restatement (Second) of Torts §§343 and 343A[5] were errone-

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[5] These sections read as follows:

> §343. Dangerous Conditions Known to or Discoverable by Possessor
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

eous.[6] In Hurst we indicated that those sections were inapplicable to a longshoreman's case insofar as they could be interpreted to create a duty of the

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§343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

[6] The trial judge's instruction paraphrasing §343 was as follows:

> A vessel owner is subject to liability for physical harm caused to his invitees caused by a condition on the vessel if, but only if, the vessel owner knows or by exercise of reasonable care would discover the condition and would realize it embodies an unreasonable risk of harm to the invitees and should expect that the invitee will not discover or realize the danger or will fail to protect himself againt it, and the vessel owner fails to exercise reasonable care to protect

shipowner to oversee and be responsible for activities of a stevedore within the latter's exclusive control. See Hurst, 554 F.2d at 1249 n.35. Such extensive responsibility, we said, would "saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate." Id; see Rich, 596 F.2d at 551.

Shortly after the trial court denied the motion for a new trial, this Court's opinion in Griffith was filed. In that case we held that in some respects §§343 and 343A were inapplicable because they

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against that danger, to protect that invitee against that danger.

The trial judge's instruction based on §343A was as follows:

> A vessel owner is not liable to its invitees for physical harm caused to the invitee by any condition of the vessel whose danger is known or is obvious to the invitee unless the owner should have anticipated the harm despite such knowledge or obviousness of the danger.

were too favorable to the shipowner. We stated that those provisions do not "define for all cases the appropriate standard of care under §905(b)," because they "would apparently relieve a vessel owner of all liability for an unreasonably dangerous condition on board ship if the invitee longshoreman has failed to exercise ordinary care in dealing with that danger, on the theory that a negligent invitee has assumed the risk of injury. . . . [T]hat principle is inconsistent with the clearly stated intention of Congress to abolish the doctrines of contributory negligence and assumption of risk" in these cases. 610 F.2d at 125. Accord, Santos v. Scindia Steam Navigation Co., 598 F.2d 480, 486-87 (9th Cir. 1979).

In the circumstances of this case, we conclude that any error in using instructions based on §§ 343 and 343A

would not be a basis for reversal, because it would be error in Oceanic's favor. The standard for vessel liability given in the jury instructions in this case was a more qualified one than that enunciated in Griffith of "'reasonable care under the circumstances.'" 610 F.2d at 125.

2. The Damage Interrogatories.

Oceanic argues that it was error to submit to the jury damage interrogatories that allowed the jury to assess as separate components pain and suffering, loss of enjoyment of life, and permanent disability. Separate assessment of disability as a distinct element of damages, Oceanic claims, is duplicative of the other two components, and an award for disability is contrary to the compensatory purpose of damage awards. Because Oceanic not only failed to object at

trial to the verdict form, but also specifically agreed to its use, the claim is reviewable by us only if the separate assessment of damages amounts to plain error that "is so fundamental or prejudicial that not to consider it could result in a gross miscarriage of justice." Thompson v. Burke, 556 F.2d 231, 236 n.8 (3d Cir. 1977).

All of the elements of the jury's damage award, however, may be found in §§905, 924 of the Restatement (Second) of Torts,[7] which, this Court has noted,

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[7] These sections read as follows:

> §905. Compensatory Damages for Nonpecuniary Harm
>
> Compensatory damages that may be awarded without proof of pecuniary loss include compensation
>
> (a) for bodily harm, and
>
> (b) for emotional distress.
>
> §924. Harm to the Person
>
> One whose interests of personality have been tortiously invaded is

is, when consistent with congressional intent, an appropriate guide in developing a uniform federal law of negligence, Griffith, 610 F.2d at 126. We need not decide whether or not separate assessment of the components was error, but only conclude that under the Restatement and Griffith any error committed would not be so clear and egregious as to be reviewable.

III. SARAUW'S APPEAL

Sarauw contends that it was error for the trial judge to apply the equit-

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entitled to recover damages for past or prospective

(a) bodily harm and emotional distress;

(b) loss or impairment of earning capacity;

(c) reasonable medical and other expenses; and

(d) harm to property or business caused by the invasion.

able credit doctrine to reduce the jury verdict by the amount attributed to Hess' negligence.[8] The Supreme Court definitively held in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 99 S. Ct. 2753, 61 L.Ed.2d 521 (1979), that the equitable credit doctrine was not an intended part of the statutory scheme. Accordingly, the 25% reduction in Sarauw's verdict must be restored.

IV. CONCLUSION

That portion of the trial court's judgment denying Oceanic's motion for judgment n.o.v. or for a new trial will be affirmed, the portion denying Sarauw's motion will be vacated, and the case remanded with instructions to enter a new judgment restoring the deduction made by the trial judge for Hess's negligence.

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[8] The rationale of the equitable credit doctrine and the reason for the Supreme Court's rejection of its application in this type of lawsuit are summarized in Griffith, 610 F.2d at 121-22.

Memorandum Opinion and
Order

IN THE UNITED STATES
DISTRICT COURT FOR
THE WESTERN DISTRICT
OF PENNSYLVANIA

THOMAS W. GRIFFITH,
Plaintiff,

v.

WHEELING-PITTSBURGH
STEEL CORPORATION
and AMERICAN COMMERCIAL
LINES, INC.,
Defendants.

Civil Action No. 73-706

This is an action for damages brought by Thomas W. Griffith pursuant to the Longshoremen's and Harbor Worker's Compensation Act, 35 U.S.C. §901 et seq.

arising out of a May 26, 1973 accident.[1] Jurisdiction is conferred on this Court

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1. The pertinent provision of the Longshoremen's and Harbor Worker's Compensation Act is Section 905(b) which states: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide shipbuilding or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies available under this chapter."

by 28 U.S.C. §1357(3).

On February 11, 1973, Griffith began his employment with the Wheeling-Pittsburgh Company at its Allenport, Pennsylvania plant. Griffith began work in the common labor pool of the construction department. The nature of his work was such that he would report to the pool each morning and thereafter report to whatever assignment was available that day. During this period, all of Griffith's duties were performed on land.

On April 1, 1973, Griffith bid into the hot mill labor pool. As was the case with his work previously, while a member of the hot mill labor pool, Griffith had no permanent duties, but rather was assigned to various jobs on a daily basis.

Including the date of the accident as a full day of work, Griffith worked 74 days for Wheeling-Pittsburgh. Of this

time, he was temporarily assigned to work at the company's barge landing with longshoreman-type duties for 3 3/4 days. Thus, of Griffith's work while he was employed by Wheeling-Pittsburgh, 94.6% was exclusively upon the land and only 5.4% of the time that he was employed by the company was spent in and about the barge landing at the Allenport plant. Of that 5.4% only about one-half of that time was actually spent working on a barge while it was in the water. The rest of the time that he was assigned to the barge landing, Griffith spent working on the railroad cars in the billet yard.

On the date of the accident, Griffith was assigned to work with the barge crew at the landing to assist in the loading of two barges. The barge on which the accident was to occur, No. 2730, was owned by defendant American Commercial Lines, Inc. (American). Three days

earlier, on May 23, it had been delivered to Wheeling and was incorporated into the latter's "coal fleet" to await future use. On May 25, No. 2730 was relocated next to the seawall at the barge landing to take on a load of sheet steel which was destined to move down river to Louisville, Kentucky. A second barge, described as a pipe barge, was positioned next to No. 2730, and it too was to be loaded. The pipe barge was positioned immediately next to the seawall, and No. 2730 was lashed alongside further out on the river.

On the morning of the accident, Griffith and the regular rivermen in the barge crew first loaded pipe into the pipe barge. During the loading of the pipe barge, which was completed before Noon, Griffith worked on the seawall and barge. No. 2730 was then moved into position for loading by a procedure known

as "rounding" in which a crane on the seawall pushed the barges away from the wall permitting the current to turn the boats around in the water so that No. 2730 was situated next to the seawall. Griffith's sole assistance during the procedure involved his throwing ropes from one barge to the other.

The crew then turned to the loading of No. 2730. At that time, Joseph Allfree, the crew's foreman, who was employed as river foreman by Wheeling, became aware that the barge covers were difficult to move. The wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent. At about 2:00 P.M. Allfree directed the crew to stop loading the barge and to close the covers. Allfree then returned to his office away from the area. The only other experienced riverman on the crew, Joseph Armstrong, then had diffi-

culty closing one of the covers. A cable was attached from the crane on the seawall to the cover to pull it shut; a second cable was attached to an adjacent cover for leverage. Because eyelets on the stuck cover were missing, the hook at the end of the cable was attached to the lip on the underside of the cover. Both Armstrong and plaintiff were standing on top of the stuck cover when tension was applied to the cable. As the stuck cover began to rise they stepped back onto an adjacent cover, but that cover moved backward and the two men fell into the hold and both were injured.

Griffith filed this action against both his employer Wheeling and the vessel owner American alleging negligence on the part of both. Both defendants have denied liability to Griffith and cross-claimed against each other for indemnification or contribution. A non-jury trial

was held on October 25, 1977 through October 28, 1977. Considering all the evidence elicited at trial, the following shall constitute findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a).

LAND-BASED STANDARD OF NEGLIGENCE

There is a general agreement that the case sub judice should be governed by the applicable land based standard of negligence. Griffith v. Wheeling Pittsburgh Steel Corporation, 521 F.2d 31, 44 (3d Cir. 1975). Far less consensus is available, however, when discussion turns toward the question of what is the appropriate land based standard.

The traditional judicial posture has been to rely upon the Restatement (Second) of Torts 343 A (1965) for standard of care. As Judge Hunter noted in Hurst

v. Triad Shipping Company, 544 F.2d 1237, 1248 (3d Cir. 1977):

> "...admiralty courts applying amended section 905(b) generally have turned to the Restatement (Second) of Torts as the national expression of non-maritime tort principles."

Representative of such a history of adherence to the Restatement standard has been the Western District Court of Pennsylvania in general, and this Court in particular. Griffith v. Wheeling-Pittsburgh Steel Corpoation, C.A. No. 73-0706 (March 22, 1977); Duncan v. Dravo Corp., C.A. No. 76-540 (February 9, 1977).

An emerging trend, on the other hand, has favored defining the standard of negligence as imposing a duty to exercise reasonable care under all of the circumstances of the case. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Rowland v. Christian, 443 P.2d 561 (1968). We take the oppor-

tunity afforded by the instant case to reassess whether or not Restatement (Second) Section 343A is a viable national standard of land based negligence.

Restatement (Second), Section 343A provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees."

"The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism." Kermarec, supra at 630. In many instances under the Restatement standard this feudal categorization predetermined substantive consequences rather than being one factor which contributed to an

overall evaluation of the alleged breach of duty. A general standard of reasonable care under all the circumstances allows the relationship of the landowner vis a vis the plaintiff to be considered to the extent relevant and invested with the weight deemed to be appropriate. Varying standards of due care depending upon the applicable agrarian classification cease to be dispositive of the case, but rather the landowner/ plaintiff relationship is one factor among many which is relevant in determining the negligence quotient.

This Court is of the belief that the major advantage to such a uniform standard of negligence would be the forthright articulation of reasons for decision. No longer would it be judicially acceptable to state that because a plaintiff is an invitee the standard of care is inflexibly prescribed. The Court must instead state that the plaintiff/ landowner relationship

is significant because of specified reasons. Although as a practical matter most cases, such as the case sub judice, would reach the same result under either a general standard of due care or the Restatement (Second) formulation, the decisions in the remaining minority of landowner negligence cases and the quality of jurisprudence in all such cases would be enhanced. Accordingly, the applicable land based standard of negligence applied in the instant case is a duty to exercise reasonable care under all of the circumstances of the case.[2]

LIABILITY OF AMERICAN AND WHEELING-PITTSBURGH

The potential liability of American

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2. For those who might contend that "a general duty of care under the circumstances" standard is too indefinite to be effective, brief mention need only be made of the enduring quality of the "reasonable man" standard.

can be examined straightforwardly by measuring its conduct against the land based negligence scale previously discussed. Liability can attach to Wheeling-Pittsburgh under Section 905(b) if negligent, only if two additional conditions precedent have also been satisfied:

(1) Wheeling-Pittsburgh must have been owner pro hac vice of the American Vessel at the time of injury.

(2) Wheeling-Pittsburgh must have been negligent in a non-stevedoring capacity.

The status of Wheeling-Pittsburgh as owner pro hac vice at the time of injury is well established under both the law of the case and the applicable case law. 384 F.Supp. at 237, 521 F.2d at 41; Blair v. United States Steel Corp., 444 F.2d 1390 (3rd Cir. 1971).

It is also abundantly clear that Wheeling-Pittsburgh was guilty of non-

stevedoring negligence in conjunction with plaintiff's injury in the following particulars: 1) Failure to give adequate safety instructions to steelworkers unfamiliar with river work; 2) Providing a defective barge for stevedore work; 3) Failing to inspect, repair, or reject the defective barge. Both predicates to a finding of liability against Wheeling-Pittsburgh having been established, its conduct also need only be measured against the appropriate negligence standard.

For the reasons which hereafter follow, American, Wheeling-Pittsburgh in its non-stevedoring capacity, and Wheeling-Pittsburgh in its stevedoring capacity, all breached their duty of exercising reasonable care toward the plaintiff.

In view of our factual determination that negligence was both pervasive and flagrant in the case sub judice, we will not dwell on the relationship between

plaintiff and the defendants as would be appropriate were the conduct of defendants less extreme. Suffice it to say that under the circumstances of this case, both American and Wheeling-Pittsburgh in its dual identity were negligent to such an extent that recovery for plaintiff would be meritorious regardless of the feudal catagorization, except trespasser. Thus, with regard to the facts sub judice, even the most restrictive duty would have found itself breached.

American failed to exercise reasonable care under the circumstances as evidenced by the delivery of Barge 2730 to Wheeling-Pittsburgh in a defective condition. Specifically, the barge cover mechanisms were rusted and bent with the eyelets on the stuck cover completely missing. Delivery of such a barge, with knowledge that many workers would necessarily come into contact with the deter-

iorated barge covers, was inexcusably negligent.[3]

Wheeling-Pittsburgh, as previously noted, was negligent in its non-stevedoring capacity by failing to require the obviously defective barge to be repaired or rejected and by failing to adequately instruct inexperienced river workers, such as plaintiff, on safety rules and proper work procedures. Stevedoring is to engage in the loading or unloading of vessels. It is apparent that Wheeling-Pittsburgh's disregard of its duty to provide a safe work environment for plaintiff was separate from its considerable additional negligence in the actual conduct of stevedoring operations.

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3. This Court finds American's argument that there was no unreasonable risk of harm created by the defective barge because experienced rivermen were capable of working safely to be singularly unappealing. Experienced rivermen supervised the operation in question and yet the accident still occurred.

In its stevedoring capacity Wheeling-Pittsburgh was negligent in attempting to close the barge covers through use of a crane even though eyelets on the barge covers were missing. An operation under the supervision of experienced rivermen should also have shown better sense than to enlist the aid of a novice in the questionable closing procedure. The prudent solution for Wheeling-Pittsburgh would have been to pursue repair of the barge. The fact that repair at the time of plaintiff's injury may have disrupted "business as usual" is no justification for the blind pursuit of an expedient, but hazardous course of action.

With due consideration for all the evidence and circumstances of the case sub judice, this Court holds that American, Wheeling-Pittsburgh in its non-stevedoring capacity, and Wheeling-Pittsburgh in its stevedoring capacity were concur-

rently negligent in causing plaintiff's injuries.

DAMAGES

Damages sustained by Griffith as a proximate result of defendants' negligence are quite extensive. When the accident occurred, plaintiff landed at the bottom of the barge's hold on his right leg, then toppled onto his left leg. He fell on his right wrist and over onto his back. Medical testimony of record substantiates plaintiff's claim for past and future medical expenses in the amount of $11,672.65.

A second component of plaintiff's damages is past and future wage loss. Plaintiff's wage losses are calculated at a rate of $800.00 per month, the amount which plaintiff was earning in 1973 for Wheeling-Pittsburgh. This Court finds total past wages and future lost wages,

reduced to present worth at 6%, supported by evidence of record, to be $42,626.80.

The total figure of $54,299.45 for medical expenses and lost earnings is largely uncontested as to reasonableness. Rather, defendants have chosen to marshal their forces in opposition to liability and the following two additional areas of claimed compensable damages.

The first area is plaintiff's claim for impairment of earning capacity. Defendants are required to compensate plaintiff for any lessened ability to earn money in the future as a result of the injuries sustained. It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. It must be determined whether or not the economic horizon of the plaintiff has been shortened because of the

injuries sustained as a result of defendants' negligence.

Evidence of record indicates that plaintiff will never again be able to perform work requiring heavy labor. He is also unable to pursue any occupation which would require standing for long periods of time or extensive movement such as walking. Thus, although Griffith can still perform effectively in many useful careers such as teaching, there are also many tasks which plaintiff is permanently foreclosed from pursuing.[4]

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4. Another example would be a trial attorney who suffers the loss of his left hand due to some defendant's negligence. The loss of his left hand would probably not affect the ability of the lawyer to be a skilled advocate. Nonetheless, plaintiff counsel would be entitled to recover for impairment of earning capacity inasmuch as he is now precluded from ever being able to function in a job which requires the use of one's left hand. It is the shortening of the attorney's economic horizon for which damages are awarded and not any actual reduction in earnings.

Bearing in mind that plaintiff's life expectancy is approximately 41 years, this Court believes that the sum of $80,000 adequately and fully compensates him for the considerable reduction in future employment opportunities caused by his severely restricted mobility and dexterity.

Lastly, plaintiff seeks to recover damages for past and future pain, suffering and inconvenience. Following the accident, Griffith suffered from severe pain in the right leg, back, wrist and heel. When he left the hospital, plaintiff had long casts on both legs and his right arm, and was completely bedfast. From May, 1973, to September, 1973, Griffith was confined completely to a stretcher, and was not permitted to ambulate. From September until November 20, 1973, plaintiff moved about only on platform crutches; in November, 1973, he was per-

mitted to change to a cane, and he has been required to walk with a cane ever since. At the present time, plaintiff continues to be affected by injuries of the right wrist, left heel, spine, chest, right ankle and right leg. A a result of the aforementioned physical restrictions, plaintiff has now also been forced to limit both family and recreational activities. With due regard for plaintiff's 41-year life expectancy and the disabling injuries previously detailed, this Court believes an award of $75,000 to be appropriate for pain, suffering and inconvenience.

In total, plaintiff is entitled to compensatory damages in the amount of $209,299.45. It remains to be considered, however, whether or not the equitable credit doctrine should be applied to the damage award.

EQUITABLE CREDIT DOCTRINE

Under the Equitable Credit Doctrine, damages are apportioned among the parties according to the extent of each one's fault. The Court calculates the award by assessing a prorated share of the damages against each party. The parties which would be considered in the case sub judice are:

1. Wheeling-Pittsburgh as owner pro hac vice;

2. Wheeling-Pittsburgh as stevedore;

3. American Commercial Lines.

The vitality of the equitable credit doctrine is uncertain. As Judge Aldisert stated in Marant v. Farrell Lines, Inc., 550 F.2d 142, 147 (3d Cir. 1977):

> "...the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence is, at least in this circuit, very much an open question."

It is in this unsettled context that we

address the merits of applying the equitable credit doctrine in the instant case.

The concept of comparative negligence is consistent with Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. "Because a literal reading of Section 5(b) creates irreconcilable conflict if the word 'negligence' is understood to mean any negligence at all, some alternative meaning which harmonizes the section must be adopted. This is simply and effectively achieved if 'negligence,' as used in Section 5(b) is recognized as contemplating the extent of fault in addition to its threshhold existence. Thus, the first sentence creates a right of recovery for injuries received to the extent such injuries were caused by the vessel, and the third sentence limits the recovery of longshoremen hired directly by the vessel only by the extent that their fellow

workers caused the injury. Thus viewed, Section 5(b) is internally consistent and in accord with the general principles of maritime law." "EQUITABLE CREDIT: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the LHWCA," 35 MARYLAND L.REV. 353, 369 (1976). Any construction of 905(b) other than one embodying comparative negligence would result in an employee of an independent stevedore recovering full damages from a negligent vessel no matter how little negligent the vessel may have been.

The Equitable Credit Doctrine is a method of damage allocation which fosters fairness through the vehicle of proportionate fault. Plaintiff Griffith should not be permitted the double recovery of damages attributable to the negligence of Wheeling-Pittsburgh as stevedore in addition to workmen's compensation.

Recovery in the case sub judice will therefore be limited to the proportionate damage caused by Wheeling-Pittsburgh in its non-stevedoring capacity and damage attributable to American Commercial Lines.

It is this Court's opinion that American Commercial Lines was 50% negligent, Wheeling-Pittsburgh in its non-stevedoring capacity 25% negligent, and Wheeling-Pittsburgh in its stevedoring capacity 25% negligent. Accordingly, damages are assessed against American Commercial Lines in the amount of $104,649.73 and against Wheeling-Pittsburgh in the amount of $52,324.87. Damages totalling $52,324.87 attributable to the negligence of Wheeling-Pittsburgh in its stevedoring capacity are not recoverable in view of the Equitable Credit Doctrine. Recovery for such

negligence takes the form of plaintiff's workmen's compensation payments.

CONCLUSION

A standard of negligence imposing a duty to exercise reasonable care under all the circumstances of the case and the equitable credit doctrine are evolving judicial principles not as yet firmly marked with the imprimatur of stare decisis. However, one of the foremost responsibilities of any system of jurisprudence is to actively engage in the pursuit of adaptable legal principles appropriate for a changing social environment. Adherence to precedent should not be so talismanic that underlying social policies justifying change are muted. A general negligence standard of reasonable care under the circumstances and the equitable credit doctrine were adopted herein not because they are older

than their competing alternatives but because this Court believes they are better. An appropriate Order will issue.

HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States District
Judge.

ORDER

AND NOW, this 15th day of June, 1978, in accordance with the foregoing Opinion, IT IS ORDERED that plaintiff is hereby awarded damages against defendant American Commercial Lines in the amount of $104,649.73 and against defendant Wheeling-Pittsburgh in the amount of $52,324.87. Costs to be taxed equally between American and Wheeling-Pittsburgh.

HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States
District Judge

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AMENDED ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Filed July 17, 1978)

THOMAS W. GRIFFITH,
Plaintiff,

v.

WHEELING-PITTSBURGH STEEL CORPORATION
and AMERICAN COMMERCIAL LINES, INC.,
Defendants.

Civil Action No. 73-0706

AND NOW, this 17th day of July, 1978, IT IS ORDERED that the Memorandum Opinion and Order of this Court of June 15, 1978 in the above-captioned case be amended to delete the following sentence which appears on page 1, lines 3 and 4: "Jurisdiction is conferred on this Court by 28 U.S.C. §1357(3)."

HUBERT I. TEITELBAUM,
Hubert I. Teitelbaum,
United States
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM McCARTHY	:	Civil Action
	:	
-v-	:	
	:	
SILVER BULK SHIPPING, LTD.	:	No. 78-1484

O P I N I O N

JOSEPH S. LORD, III, CH.J. March 19, 1980

Plaintiff, William McCarthy, a longshoreman, brought this action to recover damages from defendant vessel owner, Silver Bulk Shipping, Ltd., for personal injuries sustained allegedly as the result of defendant's negligence. The action was brought pursuant to the Longshoreman's and Harbor Worker's Compensation Act § 5(b) as amended, 33 U.S.C. § 905(b), with jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332.

On January 6, 1977, plaintiff, employed as a longshoreman by Amstar Corporation, was performing his duties in No. 1 hold discharging a cargo of raw sugar from the M/V Silvertweed, a vessel owned and operated by defendant, when he was struck on the head by a 400 lb. hulk of frozen sugar. After a four-day trial (June 5 through June 8, 1979) a jury found defendant's negligence had proximately caused plaintiff's injuries and awarded plaintiff $111,318.50 in damages. Defendant has filed post-trial motions pursuant to Rule 50 of the Federal Rules of Civil Procedure for judgment notwithstanding the verdict, or in the alternative for a new trial.

In 1972 Congress amended the Longshoreman's and Harbor Workers' Compensation of 1927 (LHWCA), 33 U.S.C. §§ 901-50, fundamentally altering the relationships among vessel owners, stevedores

(employers) and longshoremen.[1] Pursuant to the changes, a vessel owner would no longer be strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedore's negligence on a respondeat superior theory. Concomitantly, an owner no longer would have a cause of action against a stevedore for indemnification. Instead, an owner would be liable to an injured longshoreman only for its own negligence that proximately caused the injury. Rich v. U..S Lines, 596 F.2d 541, 545 (3d Cir. 1979). In addition, an employer's (stevedore's) only liability would be under a workers' compensation claim. For the restrictions

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1. For backgrond history and analysis of the changes, see Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976) ("Griffith I"); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.) cert. denied, 434 U.S. 861 (1977).

on his actions against owners and stevedores, the longshoreman received increased compensation benefits and coverage under the Act. In short, under the Act as amended, a longshoreman can bring suit only against a vessel owner and only for the owner's negligence. Although Congress did not define the standard of care by which to measure a vessel owner's liability, the House Report on the amendment made clear that vessesl owe some duty of care to longshoremen:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known abot a dangerous condition.

H.R.Rep. No. 1441, 92 Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. &

Ad. News 4698, 4707 [hereinafter "House Report"].

In a number of post-amendment cases, the Third Circuit has begun to define the extent of an owner's liability.[2] In accordance with the Congressional purpose to have a uniform federal law applied to § 905(b) cases[3], the Third Circuit has ruled that the court should look to the Restatement (Second) of Torts for guidance, but only when the sections in

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2. Griffith I, supra; Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), cert. denied, 430 U.S. 969 (1977); Marant v. Farrell Lines, Inc., 550 F.2d 142 (3d Cir. 1977); Hurst, supra; Rich, supra; Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979).

3. See House Report at 4705: "[T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law." See also Brown, supra, 545 F.2d at 862-63.

question "are clearly consistent with the purposes and policies of the Act." Rich, supra 596 F.2d at 547; Hurst, supra, 554 F.2d at 1249 n.35.[4]

Central to Congressional policy and purpose is the recognition that the Act

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4. The court in Brown held that sections 281-83, 302A, 305, 452, of the Restatement (Second) of Torts apply to § 905(b) cases. In addition, given the clearly stated intention of Congress that the doctrines of contributory negligence as a complete bar and assumption of the risk are not to apply in cases decided under § 905(b), House Report at 4705, the Third Circuit has held that §§ 343 and 343A of the Restatement are not applicable. Griffith II, supra, 610 F.2d at 125; Hurst, supra, 554 F.2d at 1249 n.35. In Hurst the Court of Appeals recognized a stevedore as an independent contractor and held that Restatement § 409 (employer generally not liable for acts of an independent contractor; subsequent sections note the exceptions) applies to § 905(b) cases with a § 414 exception (where the owner retains a degree of control over work of the independent contractor such that liability may be imposed on the owner). The court held that the exceptions stated in §§ 416 through 429 of the Restatement rest on theories of vicarious liability and therefore are not applicable to a § 905(b) case.

places primary responsibility for safe working conditions on the stevedore. Brown, supra, 545 F.2d at 860; Rich, supra, 596 F.2d at 548. Although the Third Circuit reversed and remanded in Marant on this basis, supra 550 F.2d at 144, the Court of Appeals has consistently recognized that although owner and employer are not concurrently or jointly responsible for the safety of longshoremen, they can be concurrrently liable for injuries they have proximately caused. That is, a vessel owner can be found liable for its negligence notwithstanding the negligence of the stevedore. Griffth II, supra, 610 F.2d at 124-25. Indeed, as the Supreme Court has observed in its most recent opinion on the 1972 amendments, "a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from

the ship." Edmonds v. Compagnie Generale Transatlantique, ____ U.S. ____, ____ (1979).

In its most recent opinion in a § 905(b) case, the Third Circuit has held that "[the section] imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land-based business." Griffith II, supra, 610 F.2d at 125. Thus it held that a vessel could be found negligent on a showing:

> (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Id. at 126. This standard must be analyzed in the context of defendant's

post-trial motions.[5]

A. Motion for Judgment Notwithstanding the Verdict

The standard for a motion for judgment notwithstadning the verdict[6] is whether plaintiff has adduced sufficient evidence to create an issued of fact for the jury. The court does not weigh the evidence or pass on the credibility of witnesses. In application, the motion is

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5. In accordance with Rule 50 of the Federal Rules of Civil Procedure, defendant properly moved for a directed verdict at the close of plaintiff's case and when denied, again at the close of all of the evidence. The motion for judgment notwithstanding the verdict or in the alternative for a new trial was timely filed.

6. The standard for deciding directed verdict and judgment notwithstanding the verdict motions is the same. Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205, 1210 n.5 (3d Cir.); cert. denied, 400 U.S. 826 (1970); Wright & Miller, Federal Practice & Procedure, Civil § 2524 at 542.

granted sparingly, since it deprives a party of a jury's determination of the facts. Jeanes v. Milner, 428 F.2d 598, 601 (8th Cir. 1970).

Defendant bases its motion for judgment notwithstanding the verdict on four general points:

1. That the evidence offered was not sufficient to established a cause of action under the applicable law;

2. That defendant was relieved of liability under § 452(2) of the Restatement (Second) of Torts;

3. That the evidence was not sufficient to show that defendant's negligence caused plaintiff's injuries;

4. That the jury's findings as to loss of earnings "are against the clear weight of the evidence." Shipowners' Brief in Support of its Post-trial motions at 12.

1. Cause of Action under § 905(b)

Plaintiff's case in brief is that defendant negligently maintained the hatch covers of the vessel so that sea water leaked into Hold No. 1 and in combination with freezing temperatures caused some of the sugar to freeze, thereby creating the dangerous condition that caused plaintiff's injuries.[7] There was undisputed evidence that the cargo of sugar in Nos. 1 and 6 holds was "damaged by reason of wetting," that chemical tests showed a saline reaction (presence of seawater), that the source of the entry into No. 1 hold was through the hatch

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7. Under this theory it is irrelevant that defendant did not know that the sugar was frozen until the hatch was opened. Compare Valle v. Jugoslavenska Linejska Plovidbva, 434 F.Supp. 608, 611 (S.D.N.Y. 1977) ("shipowner does not have a duty to discover and correct hidden defects in the cargo after his ship has been loaded by competent stevedores.")

cover, that heavy rust on the raised lips of the hatch coamings prevented the cover from providing a water tight seal. American Marine Services, Inc. Survey Report, Transcript (T) 1-18 through 22. In addition there was undisputed testimony that it would take years to build up the pattern of rust on the coaming lip, T 1-47, and that the vessel's crew was responsible for maintaining the hatch closing system. T 1-48.

That defendant was negligent in failing to maintain the hatch covers in a reasonably safe condition was not disputed at trial, and I so charged the jury. T 3-58 through 59; see also T 2-55 through 56 (during argument on defendant's motion for directed verdict, defendant conceded negligence with regard to the hatch covers); Shipowner's Brief at 2.

That a vessel owes a duty of care for reasonable maintenance of the ship is equally clear. The Third Circuit in Hurst held that the vessel's "responsibility relates to the condition of the ship itself, not the activities of the stevedore." Supra, 554 F.2d at 1250 n.35. In Rich the court held that plaintiff is required to show that the vessel owner normally assumes responsibility for the maintenance and care of the items in question. Supra, 595 F.2d at 553.[8]

By asserting that plaintiff failed to produce sufficient evidence to establish a cause of action under the applicable law, defendant in effect is claiming that no duty of care was owed. In

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8. As distinct from the instant case, in Rich, "the vessel owner's sole involvement in the events leading up to Rich's injury amounted to taking no action to remedy a condition of the cargo not customarily his responsibility." Supra, 596 F.2d at 555.

support of this proposition defendant claims, as did the vessel owner in Griffith II, that plaintiff has failed to adduce sufficient evidence as to the second prong of the Griffith II test:[9]

. . .

> (2) That the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship.

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9. In Griffith II the Court of Appeals concluded, "Certainly, there was ample evidence to support the court's conclusion that American knew or should have known of the rusted, decrepit condition of the covers on barge 2730, and that American failed to exercise reasonable care to correct that condition." Supra, 610 F.2d at 126. Defendant also agrues that under the standard of care established in Restatement (Second) of Torts §§ 343 and 343A, the condition of the sugar was "known and obvious" and defendant is thereby relieved of liability. As noted supra, note 4, the Third Circuit has rejected the application of these sections to § 905(b) cases on the grounds that they are inconsistent with Congressional policy to abolish doctrines of contributory negligence as a complete bar, assumption of the risk, and nondelegable duty in § 905(b) cases.

Inasmuch as defendant knew or should have known of the rusty condition of the hatch covers and failed to correct it, defendant is held to knowledge that seawater could, as it did, enter the holds thus damaging the cargo. Defendant argues that under Restatement (Second) § 302, the condition created was harmless if left to itself. Thus, the defendant would only be negligent if it reasonably could recognize the subsequent actions of the stevedores as probable. Restatement (Second) § 302 Comment d. Probability of Intervening Action.

It is disingenuous of defendant to argue that "the improperly maintained hatch cover and the bulk sugar in the hatch at the time the vessel arrived in Philadelphia, were harmless of themselves," Shipowner's Brief at 3, and that it could not foresee the stevedore's subsequent acts as "probable"

Restatement (Second) § 302 Comment d.[10] The owner contracted with the stevedore to unload the cargo, thus obviously aware that longshoremen would be working in the hold. That is, there is no possibility that the condition in the hold resulting from the improperly maintained hatch covers would go unacted upon by others. Thus it was reasonably foreseeable that water leakage into the hold alone or in combination with winter weather conditions could cause the sugar to freeze, thereby creating a hazardous working condition for the longshoremen.

In addition, in this case there was evidence that plaintiff used standard equipment for unloading a cargo of sugar,

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10. It should be noted that § 302 only involves the foreseeability of the subsequent acts, not whether they were negligent. Compare § 302A.

T 1-85, that use of other equipment was not practical given the circumstances, T 1-85, 2-28 through 30, that the three-part cycle method of discharge was common in the industry, T 1-27 through 32, 1-124, 2-83 through 84. This evidence was more than sufficient to create an issue for jury consideration. The only evidence to the contrary was offered by defendant's expert Mr. Keeler who testified that when he supervised stevedoring operations a different method was used; Mr. Keeler further testified that the methods with which he was familiar were out-of-date. T 2-83.

This is not a case where the vessel owner turned over a ship in a reasonably safe condition to a stevedore, and a longshoremen is attempting to impose liability on the owner.[11] As the Court

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11. Compare Hurst, supra, 554 F.2d at 1249 n.35.

of Appeals noted in Rich, it had remanded the cases in Brown and Marant in light of evidence "suggesting the vessel owner was directly involved with creating the condition which resulted in the longshoreman's injury," supra, 596 F.2d at 555. The court in Rich further explained that in view of the purpose of the Act to encourage safety on the waterfront, "in order to impose liability on the vessel owner under Section 905(b), we must be sure that it and not the stevedore is in the position best able to prevent similar accidents from arising in the future." Supra, 596 F.2d at 554. In light of the conceded negligence of the defendant, the testimony as to use of unexceptionable methods of discharging a cargo, and the policy underlying the Act, I conclude there was sufficient evidence for plaintiff to have prevailed under the standard enunciated in Griffith II.

2. Superseding Cause

Defendant argues that as a matter of law it should be releived of liability under § 452(2) of the Restatement (Second) of Torts.[12] Section 452 in its entirety provides:

> (1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm.
>
> (2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.

Section 452 itself gives little assistance in defining the standards for measuring when responsibility has shifted to a

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12. Contrary to plaintiff's assertion, the Third Circuit has expressly held that § 452(2) is applicable to § 905(b) cases. Brown, supra, 545 F.2d at 863; Plaintiff's Brief in opposition to defendant's post-trial motions at 16.

third person, thereby relieving the original actor of liability for negligence. Comment d. does state that subsection (2) covers the "exceptional" cases.[13]

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13. This statement comports with Third Circuit holdings in § 402A products liability cases that the intervening act must be

> so extraordinary as not to have been reasonably foreseeable, and . . . whether the act was reasonably foreseeable [is] to be determined by following retrospectively the sequence of events and looking back from the harm to the negligent act rather than by considering whether the defendant should prospectively have envisaged the events which unfolded and caused the accident.

Wilson v. American Chain and Cable Co., 364 F.2d 558, 562 (3d Cir. 1966). The Wilson formulation was applied by then District Judge Higginbotham in a non-products liability suit. Hennigan v. Atlantic Refining Co., 282 F.Supp. 667, (E.D.Pa. 1967), aff'd, 400 F.2d 857 (3d Cir. 1968), cert. denied, City of Philadelphia v. Atlantic Refining Co., 395 U.S. 904 (1969). In its most recent decision involving a superseding cause claim in a non-products liability case, the Third Circuit cited Pennsylvania law that incorporates a requirement of extraordinariness. Bradshaw v. Rawlings, Nos.

(footnote 13 continued next page)

Comment e., however, notes that in many cases the duties and obligations are such that they cannot be shifted.

Defendant advances a number of reasons why the duty to prevent harm had shifted to the stevedore. Shipowner's Brief at 6-7.[14] Essentially defendant

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(footnote 13 continued)
79-1409, 1410, 1411, 1414 (3d Cir. Dec. 17, 1979) at 18.

Most of these suits involved the application of state law concepts of strict liability under diversity jurisdiction. There is no reason, however, not to apply in a federal case the principle that it is only the extraordinary or the unforeseen that can be characterized as a superseding cause, for the absence of a fault requirement in the initial acts has no bearing on the unforeseeability of a third person's acts. Whether based on a fault or no-fault theory, a party had breached a duty and would have been liable save for circumstances that shifted the duty.

14. As in Blackburn v. Prudential Lines, Inc., "Defendant merely asserts, without demonstrating why, that this duty shifts at the time the stevedore comes on board from defendant's shoulders to the stevedore's rather than rests on both parties." 454 F.Supp. 1302, 1308 (E.D. Pa. 1978).

raises three issues: primary responsibility for work place safety rests on the stevedore[15]; the stevedore's method of discharging the cargo was negligent[16]; because the stevedore and plaintiff knew of the condition of the cargo, they assumed the risk and/or were contributory negligent.[17]

That the major responsibility for the proper and safe conduct of the work rests on the stevedore is not disputed. Brown, supra, 545 F.2d at 860; Marant, supra, 550 F.2d at 144; Rich, supra, 596 F.2d at 548. The imposition of a duty on stevedores does not, however, relieve owners of their duty to exercise reasonable care with regard to the condition of

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15. Reasons Nos. (1) and (2), Shipowner's Brief at 6.

16. Reasons Nos. (7), (8), (9), (10), (11). Shipowner's Brief at 6-7.

17. Reasons Nos. (3), (4), (5), (6), (8). Shipowner's Brief at 6-7.

the ship. As the Supreme Court made clear in Edmonds, the 1972 amendments provide for the concurrent negligence of stevedore and vessel owner. In this light, no Third Circuit case has held that the sole responsibility for safety rests on the stevedore.

With regard to the stevedore's negligence, the facts that "the stevedore has been negligent cannot be automatically decisive of [the] question [whether the vessel has breached its duty of care]." Griffith II, supra, 610 F.2d at 125. As noted at trial in the instant case, proof that the stevedore used improper methods would only show that the stevedore may have been joint or concurrent tortfeasor. T 2-77.[18] Thus,

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18. See discussion of stevedore negligence, infra, note 25 and accompanying text.

assuming negligence on the part of a stevedore, a vessel owner can still be liable for its own negligence. Short of showing extraordinary, i.e., unforeseeable, acts by the stevedore, an owner cannot claim relief from liability under § 452(2). The defendant here has not shown any degree of extraordinariness in the stevedore's actions such that as a matter of law I could rule defendant relieved of liability under § 452(2).

Interrogatory No. 2 was presented to the jury as follows:

> Q. If your answer to No. 1 is YES,[19] was this a condition which could have been remedied by a reasonable stevedore?

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19. Interrogatory No. 1:

> Did the leakage of seawater into the hold alone or in combination with the freezing temperature bring about a condition which was a substantial factor in causing the accident?

At the time of trial it was understood by counsel and myself that if the jury answered "Yes" to No. 2, defendant would have been relieved of liability, T 3-39 through 42, on a theory that a vessel owner's duty encompasses knowledge of what a reasonable stevedore would do, and if the stevedore could have remedied the condition, then there would have been no breach of duty. The opinion in Griffith II, filed after this trial, appears to reject this analysis. The court reasoned that this approach would relieve a vessel of liability for its own negligence whenever a stevedore was negligent, by virtue of imputing "to the non-negligent longshoreman the negligence of his stevedore employer, and establishing[ing] that negligence as a complete bar to recovery against the vessel." Supra, 610 F.2d at 124-25. Inasmuch as Interrogatory No. 2 offered defendant a possibility

for relief from liability that the Third Circuit now tells us would have improper, the question as posed to the jury is at most harmless error.

The Interrogatory constitutes a finding of fact, however, useful for determing defendant's motion. As I charged the jury, the Interrogatory asked whether a reasonable stevedore could have removed the "huge lump of sugar", T 3-56, that was sticking to the ribs of No. 1 hold in such a way as to have prevented the injury. Had the jury answered "Yes," Griffith II tells us that additional questions would have to asked before a vessel owner would be relieved of liability.[20] By answering "No" as it did, the jury told us that the owner's negligent

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20. In Griffith II, the Court of Appeals stated that it was not holding "that the likelihood of negligent conduct on the part of the stevedoring contractor is always irrelevant in determining whether the vessel has breached its duty of due
(footnote 20 continued next page)

acts were responsible for the injury notwithstanding the acts of the stevedore. The stevedore's negligence, if any, was therefore at the least irrelevant to the injury; at most it might have enhanced the damage. Thus, on the facts as found by the jury, the acts of the stevedore could not constitute a superseding cause of the injury.[21]

(footnote 20 continued)
care." Supra, 610 F.2d at 125. Although the court did not state when the likelihood of negligent conduct would be relevant, several observations are in order. First, the holding suggests that the likelihood of a stevedore's negligent conduct is sometimes irrelevant. Second, the implication (the Court of Appeals refers the reader to §§ 302A and 302 of the Restatement (Second) of Torts) is that if the negligence is foreseeable, the owner would not be relieved of liability; conversely, if unforeseeable (i.e., extraordinary) the owner would not be held to have breached its duty of care.

21. Thus if under Griffith II a more approriate second interrogatory would have asked the jury to decide if the stevedore's acts constituted a superseding cause of the injury, the jury in fact answered that question by its response to the Interrogatory as originally formulated.

The question in terms of defendant's motion for judgment notwithstanding the verdict is whether the evidence was sufficient for the jury to have answered the way it did. I conclude that in light of the evidence of methods used by stevedores to unload sugar cargoes and the methods used in this particular instance, there was sufficient evidence for the jury to have concluded as it did.

Defendant next argues that the stevedore and longshoremen knew that the sugar was frozen when the hatch was first opened, that they knew the sugar would fall if left caked, that they had completed two discharge cycles before the accident, and that they received "distress wages" for unloading the cargo. In essence, these arguments rest on theories that the stevedore and plaintiff had assumed the risk and/or were contributory

negligent. Neither is a defense to a § 905(b) claim. See supra, note 4.

3. Causation

Defendant asserts that plaintiff did not introduce sufficient evidence for the jury to have answered Interrogatory No. 1. See supra, note 19. Plaintiff's case required the jury to conclude that it was more probable than not that the seawater in the hold in combination with the freezing temperatures caused the sugar to freeze to the ribs of the ship. Defendant, on the other hand, argued to the jury that the moisture content of the sugar itself, in combination with the freezing temperatures, caused the sugar to freeze.

Plaintiff introduced evidence as to the presence of seawater in the sugar, the source of its entry, the weather conditions at the Port of Philaldelphia when the ship was berthed there for loading,

the discoloration of the frozen sugar when the moisture is seawater. I conclude that this evidence was sufficient for a jury reasonably to infer that the wetness due to leakage, as opposed to the moisture content of the sugar itself caused the freezing. In this light, the jury was instructed at length as to the difference between mere speculation and a conclusion resting on reasonable inferences. T 3-55 through 58.[22]

4. Loss of Earnings

Defendant's arguments that the jury's answers to Interrogatories Nos. 3(a) and 5 are "against the clear

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22. A case properly goes to the jury even if no facts are in dispute but there are conflicting inferences that may be drawn from them. Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co., 427 F.2d 862, 868 (4th Cir. 1970).

weight of the evidence"[23] should be directed to a motion for a new trial, and not for judgment notwithstanding the verdict.

B. Motion for New Trial[24]

The defendant asserts that I erred in my rulings that the stevedore's negligence was not at issue and that plaintiff's application for a union pension based on age and service was not admissible evidence; and that there was no

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23. Interrogatory No. 3(a) reads as follows:

> Over what period of time, if any, would the plaintiff have worked gainfully in the future had it not been for the accident?

Interrogatory No. 5 reads as follows:

> How much has the plaintiff lost in past earnings from the date of the accident until the present time as a result of the accident.?

24. In accordance with the mandate of Rule 50(c) of the Federal Rules of Civil Procedure, I must rule on the motion for a new trial as well as the motion for judgment notwithstanding the verdict.

jury charge on contributory negligence. I conclude that none of these assertions is a sufficient basis for granting a new trial.

1. Stevedore's Negligence

Negligence on the part of the stevedore does not necessarily relieve a negligent owner of liability. Griffith II, supra, 610 F.2d at 125. In this case negligence of the owner was not in dispute; the issue for the jury was causation: was the negligence of the owner the proximate cause of plaintiff's injuries. In this regard proof of the stevedore's negligence was irrelevant.[25]

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25. Whether the acts or omissions of the stevedore amounted to superseding cause thereby relieving the owner of liability has been discussed in the first part of this opinion. Suffice it to observe that superseding cause turns on the question of foreseeability (from hindsight) of the third party's acts and not on the negligence of those acts.
(footnote 25 continued next page)

Defendant asserts that its defense, for factual consideration by the jury, was that the negligence of the stevedore was

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(footnote 25 continued)

When defendant sought to introduce Occupational Safety and Health Act regulations (OSHA), 29 CFR § 1918.83 to establish the stevedore's negligence, I refused to admit them inasmuch as I held that proof of the stevedore's negligence was not relevant. T 2-164 through 165. Whatever duty of care the OSHA regulations impose on the stevedore does not relieve a vessel owner of the duty of care the Act imposes on it. House Report at 4704. When other courts have dealt with the impact of the OSHA regulations on vessel owners, the question has been whether the regulations impose a duty of care on the vessel, not whether breach of the regulations by a stevedore relieves a vessel of liability. See Bachtel v. Mammoth Bulk Carriers, Ltd. 605 F.2d 438 (9th Cir. 1979); Rich, supra; Chavis v. Finnlines, Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978); Gay v. Ocean Transport and Trading Ltd., 546 F.2d 1233 (5th Cir. 1977); Blackburn, supra. It is interesting to note that were we to follow those circuits that hold that the regulations impose a duty on the vessel, it is likely defendant would have been in the position of arguing to prevent their admittance into evidence.

the sole proximate cause of the accident. Shipowner's Brief at 14. Defendant needed to show that the stevedore's acts or omissions, negligent vel non, were the proximate cause of plaintiff's injuries.[26] To this end the record shows full description and explanation of the stevedore's actions; in addition, defendant was permitted to cross-examine plaintiff and plaintiff's witnesses and to introduce evidence on its own about alternate methods of discharging a cargo of sugar. T 1-69 through 71, 1-81 through 90, 1-104 through 106, 1-122 through 124,

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26. Not only was defendant not required to prove that the stevedore's acts were negligent, but such proof might have been confusing to the jury, since such proof of stevedore's negligence would not have relieved the shipowner of liability.

2-30 through 31, 2-75 through 78, 2-89 through 91.[27]

Defendant asserts that by submitting Interrogatory No. 2 to the jury, the stevedore's negligence was placed in issue even though defendant had not been permitted to introduce evidence as to that negligence. Interrogatory No. 2, as discussed above, went to the issue of the vessel owner's duty and whether that duty had shifted to a third party. In order to answer the interrogatory, the jury did not need to consider evidence of the stevedore's negligence. Even the conceded negligence of the stevedore would not necessarily bar recovery from the owner.

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27. Indeed defendant's expert witness, Mr. Keeler, was permitted to testify as to whether in his opinion the method used by the stevedore was improper. T 89 through 91. This testimony (whether the stevedore's methods were proper as distinct from what those methods were) was admitted as evidence on the question of plaintiff's contributory negligence. T 2-165. See discussion of contributory negligence; infra.

Thus the ruling keeping out evidence of the stevedore's negligence and submission to the jury of Interrogatory No. 2 are not contradictory.

2. Union Pension

At the beginning of the trial the parties stipulated to the life expectancy of a 64 year old male (age of plaintiff at date of accident) and a 66 year old male (age of plaintiff at time of trial). Defendant argued at trial that plaintiff would have retired at age 65, and therefore damages for wage loss should be cut off as of December 1977, plaintiff's 65th birthday. To this end, defendant introduced evidence as to the customary age of retirement in the longshoring industry. T 2-167 through 170. Defendant also elicited from plaintiff the fact that he had applied for and received a social security retirement pension not based on disability, T 1-132, before I sustained

plaintiff's objection to further cross-examination on portions of plaintiff's pension application. T 1-132 through 136 A; T 2-7 through 13.

It is proper to prove damages by introducing evidence of plaintiff's earnings at the time of the injury and of life and work life expectancy. In this respect, the jury was free to accept or reject this evidence and mold the verdict according to its view of the work life expectancy and salary of the plaintiff.

Plaintiff had applied for pensions after the accident and at a time when he was automatically eligible for a pension based on age without necessity of proving disability. After argument by counsel, I concluded that further cross-examination on the social security retirement pension and plaintiff's Union pension would be unduly prejudicial to plaintiff. T 1-135 through 136A, 2-7 through 13. I reaffirm

that judgment. My reasons as then articulated seem to me sound on reflection:

> I think that under 403, under Federal Rule of Evidence 403 it may possibly have some relevance, but I think that the prejudice so outweighs the probative value of it.
>
> Here is a man who has been hurt and it is perfectly conceivable that he would contend that if he had not been hurt he would have continued to work for X number of years but once he got hurt he went on a, he thought, "Now that I am hurt it is time to retire," and I think that is all it proves.
>
> Whereas I think the effect on the jury may very well be to persuade them that he didn't intend to continue to work; that he is not working because of disability but because he is receiving a retirement and I think that the prejudice outweighs the probative value of the evidence.

T 1-135 through 136.

3. Contributory Negligence.

Defendant filed a Supplemental Motion for a New Trial three days after the filing of the Motion for Judgment

Notwithstanding the Verdict or New Trial and within the ten day period mandated by Rule 50 of the Federal Rules of Civil Procedure. This last document is not actually a supplemental motion, but rather a supplement to the original motion in the form of an additional reason for a new trial. Defendant asserts I erred in failing to submit to the jury the issue of plaintiff's contributory negligence.

Although a defendant vessel owner cannot assert the contributory negligence of the stevedore to reduce a plaintiff longshoreman's recovery, Edmonds, supra, evidence of the contributory negligence of the plaintiff can be considered in mitigation of damages. Edynak v. Atlantic Shipping, Inc. Cie Chambon Maclovia S.A., 562 F.2d 215, 219 n.5 (3d Cir. 1977), cert. denied, 434 U.S. 1034 (1978).

Rules 49 and 51 of the Federal Rules of Civil Procedure bear on this issue.

Rule 49 regarding special verdicts and interrogatories states in relevant part that if in giving instruction to the jury on answering interrogatories,

> the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury.

The rule goes further and says that as to such issues omitted findings in accord with the special verdict are to be implied.

Rule 51 in pertinent part states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.[29]

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29. It should be noted that defendant not only did not object to the jury instructions in timely fashion, but in the supplement to his motion where he advances the omission of the contributory negligence charge (and interrogatory) as error, he fails to state the grounds for his objection in accordance with the rule.

Defendant did not note his objections on this issue either during the framing and presenting of the interrogatories to the jury or in response to the charge, and has therefore waived his objection. Holloway v. J.B. Systems, Ltd, No. 79-1219 (3d Cir. Nov. 26, 1979) at 10. The question remains whether in spite of the failure to object, the absence of a charge on contributory negligence was so fundamental that it constitutes reversible error. Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 n.12 and accompanying text (3d Cir. 1975); 5A Moore's Federal Practice § 51.04 at 51 (2d ed. 1979).

Defendant's expert, Mr. Keeler, testified as to a variety of tools that could have been used to discharge the cargo. This testimony was permitted as relevant to the issue of contributory

negligence. T 2-78, 2-165. In most circumstances the question of contributory negligence by a longshoreman plaintiff, leading to a reduction of damages, is a question for the jury, Lopez v. A/S D/S Svenborg, 581 F.2d 319, 322 (2d Cir. 1978), and in this context the vessel owner is entitled to the most favorable reading of "all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." Chavis, supra, 576 F.2d at 1083.

However, where defendant has not met its burden, that is, it has failed to introduce sufficient evidence for a jury reasonably to find in its favor, it would be error for a judge to instruct a jury on the issue "for it allows the jury to speculate that in some way plaintiff's own negligence may have caused [the injury]" (emphasis added). Id. at 1082.

Unlike the situation in Chavis, in this case there was no credible evidence from which the jury could have concluded that use of the suggested alternative tools was feasible, and I so charged the jury:

> There have been suggestions of the use of a pick or of a hammer or of a pneumatic drill, but I have heard no evidence from anybody, I have heard no evidence from anybody that any of those methods were feasible under the circumstances that there were here.

T 3-60.[30] As a matter of law I conclude defendant has not made out a case of contributory negligence on the part of plaintiff. Thus defendant cannot prevail

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30. Mr. Keeler also testified about alternative methods of discharging the cargo, T 2-83 through 85, 2-90 through 91, as distinct from tools used by the longshoremen. The methods of discharging cargo that he described are the responsibility of the stevedore and not a person in plaintiff's capacity, and therefore are not relevant to the issue of plaintiff's contributory negligence, if any.

even under the fairness test principle that operates to mitigate the harsh effect of Rules 49 and 51.

For the foregoing reasons I deny defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, and an order will be entered accordingly.

Joseph S. Lord, III, Ch. J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM McCARTHY	:	Civil Action
	:	
	:	
-v-	:	
	:	
	:	
SILVER BULK SHIPPING, LTD.	:	No. 78-1484

O R D E R

AND NOW this day of March, 1980, it is hereby ORDERED

That defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial is DENIED for the reasons set forth in the accompanying opinion.

Joseph S. Lord, III, Ch. J.

DIVISION OF ST. CROIX

LAWRENCE A. SARAUW,	:	
	:	
Plaintiff	:	
	:	CIVIL NO. 1978/57
vs.	:	
	:	
OCEANIC NAVIGATION CORPORATION and VLCC ANDROS ATLAS,	:	
Defendants	:	

MEMORANDUM OPINION WITH ORDER ATTACHED
(Filed June 8, 1979)

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YOUNG, District Judge

Plaintiff, Lawrence Sarauw, is a longshoreman who was, in 1977, employed by Hess Oil Virgin Islands Corporation

("HOVIC") and he brought this personal injury action in admiralty, under 33 U.S.C. §905(b), against the super tanker, the VLCC "Andros Atlas" (herein, sometimes referred to as the "ship" or the "Andros Atlas") and its Greek owner corporation, the Oceanic Navigation Corporation (herein sometimes, the "ship's owner" or "Oceanic"). Plaintiff seeks compensatory damages of over One Million Dollars for injuries allegedly sustained by him while working for HOVIC as a dock helper at one of HOVIC's docks where the "Andros Atlas" was tied up. Briefly, plaintiff fell onto the dock when the gangway broke loose from the ship's side. At the time of this accident, the ship was discharging crude oil into the intake pipes of the Hess Oil Refinery located in St. Croix.

At the conclusion of the four day trial before a jury, both sides moved for, but were denied, directed verdicts, and the six member jury returned a verdict in plaintiff's favor. Pursuant to the verdict form, the jury found that defendants, Oceanic and "Andros Atlas", were fifty percent at fault for the accident, that plaintiff himself was twenty-five percent contributorily responsible and that HOVIC was twenty-five percent at fault. The jury found that $190,800.00 would be the total amount of damages which would fairly and adequately compensate plaintiff for his injuries, but, pursuant to the Court's instructions, this award was reduced in proportion to the percentage of plaintiff's own contributory negligence and the percentage attributable to HOVIC. Accordingly, judgment was entered on March 27, 1979 in favor of plaintiff,

the amount of $95,400.00 together with costs of $12,995.00 ($12,000 of which are for attorney's fees).

There are now before me several motions, to-wit: (1) Plaintiff has moved for judgment notwithstanding the verdict [In brief, he wants the full award of damages without deduction for any contributory negligence, (2) Plaintiff also moved to amend the judgment under Rule 59(e) [In brief, he objects to the Court's application of the "Murray Credit" wherein plaintiff's award of damages was further reduced by the percentage that his employer, HOVIC, contributed to the accident.], (3) Defendants have moved for judgment notwithstanding the verdict, or (4) in the alternative, for a new trial. Both sides have submitted memoranda in support of their own motions and in opposition to the motions of the other side. For the

reasons stated below, all motions will be denied.

I.

PLAINTIFF'S MOTION FOR J.N.O.V.

Plaintiff argues that there was insufficient evidence to present the question of plaintiff's alleged contributory negligence to the jury. I disagree. The record reflects the following:

Plaintiff testified that while he was working as a dock helper on the later shift in the early morning of November 15, 1977, he became vexed and upset because he was requested to work a second consecutive shift. During this second shift, he became engaged in replacing the small gangway with the larger, more substantial gangway. He decided to make this change

because the rise of the vessel, as its cargo weight was lessened, made the angle of the smaller gangway unsafe and the increased height of the ship's deck from the dock level, mandated the larger gangway. After failing to attract the attention of anyone, whether longshoreman or sailor on board the ship, he determined to attempt this task by himself without help. While operating the crane to place the top of the large gangway on the ship's deck, he noticed a chain blocking the place along the gunwale where the gangway would be placed. He, therefore, descended from the crane and started up the small gangway which had not yet been removed from the ship's side. When he was part way up, the small gangway suddenly came loose from the ship's side and fell down to the dock. It was undisputed that the samll gangway was not, at that

time, securely fastened to any pad eyes or stanchions on the ship's deck. It was also undisputed that plaintiff had previously used this same gangway on two previous occasions in boarding the ship.

With these facts in evidence, I cannot say that there could be but one conclusion that the jury, as reasonable persons, could have reached [1] --to wit, that plaintiff was not free from contributory negligence. Furthermore, his own testimony was that he made the decision to

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1/ The standard to be applied in resolving a j.n.o.v. motion was set forth in Relo v. Insurance Co. of North America, 1975 St. Croix Supp. 404 (D.C.V.I. 1975) as follows: "Whether the evidence is such that without weighing the evidence or passing on the credibility of witnesses or substituting its judgment on the facts for that of the jury, and giving the party against whom the motion is made, the benefit of every legitimate inference that can be drawn from the evidence, whether there can be but one conclusion as to the verdict that reasonable men could reached." 1975 St. Croix Supp. at 407-408.

replace the small gangway with the larger one because the smaller gangway was becoming less secure as the deck of the ship rose above the dock. Clearly there was some evidence of plaintiff's own fault, and I believe that it was enough to go to the jury.

II.

THE "MURRAY CREDIT" DOCTRINE

In a case [2/] involving the Federal Employee Compensation Act, 5 U.S.C. §8101, et seq (1970), decided by the Court of Appeals for the District of Columbia Circuit, a fixed fifty percent reduction of recovery was allowed because of the employer's contribution to the fault and causation of the accident. This credit reduction has come to be known as a

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2/ Murray v. United States, 132 U.S. App. D.C. 91, 465 F.2d 1361 (1968).

"Murray Credit." The Murray Credit was subsequently extended to a longshoreman came [3/] arising prior to the 1972 amendment of the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §901, et seq.

Judge Leventhal (with his co-panelists, Judge McGowan and now Chief Justice Berger [sic]) explained the Murray Credit as follows:

> A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but the act gave him assurance of compensation even in the absence of fault. Murray v. United States, 132 U.S.App.D.C. 91, 405 F.2d 1361 at 1366 (1968).

Judge Aldisert, in Marant v. Farrell Lines, Inc., 550 F.2d 142 at p. 147

3/ Dawson v. Contractors Transport Corp., 151 U.S.App.D.C. 401, 467 F.2d 729-30 (1972).

(1977), succinctly observed: "...the question of a possible credit to the vessel in cases of concurrent stevedore-vessel negligence is, at least in this circuit, very much an open question." At the time of Judge Aldisert's observation in 1977, the Murray Credit was rejected by the Ninth Circuit, Dodge v. Mitsui Shintaka Ginko, 528 F.2d 669, 672 (1975) cert. denied, 425 U.S. 944, 96 Sup. Ct. 1685, 48 L.Ed.2d 188 (1976), but had been accepted by the Washington, D. C. Circuit, Dawson, supra.

My research of the appellate decisions since 1977 concerning the Murray Credit has not been as exhaustive as I would have like it to be, but I must concede that I have found no other appellate court decisions accepting or rejecting the Murray Credit (or "Equitable Credit") to LHWCA cases. Hence, I believe that the same is still an open issue, especially in this circuit.

I have decided to apply the Murray Credit because I am completely persuaded that it is fair--fair to the vessel owner and still fair to the longshoreman. The vessel owner is not tapped for the full damage award when it may have been only half at fault (as it was here). On the other hand, even though the longshoreman has had his award reduced proportionately to his employer's degree of fault, this is the price one pays for the positive benefits of a workmen's compensation scheme. In St. Croix, the personal injury lawyers are, shall I say, blessed with two processing industries (oil and alumina [sic]) which, unfortunately, give rise to many industrial accidents and personal injuries cases. Most of these cases go beyond workmen's compensation claims for the underlying reason that the two basic companies customarily contract out maintenance repair and expansion work to independent concerns. Thus, in addition to

claims under workmen's compensation, third party liability actions are routine. Having presided for several years over many of these suits, I have become convinced that the Equitable Credit is indeed equitable. Contrary to Judge Van Dusen's concern or apprehension that an acceptance of the Murray Credit will lead to increased litigation, [4/] I sincerely believe that it will decrease litigation. I believe that it should encourage the parties to settle by removing the large dollar sign from the vision of the injured workman in those cases where the injury was in large part due to the employer's fault.

As I previously mentioned, the jury in this case found that HOVIC was twenty-five percent at fault, plaintiff, twenty-five percent at fault and the ship and

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4/ See Judge Van Dusen's concurring opinion in Marant v. Farrell Lines, Inc., 550 F.2d 142, at p. 148 (1977).

ship owner, fifty percent at fault. Accordingly, I rediced [sic] the total award of $190,800.00 to $95,400.00, giving the vessel a fifty percent credit because of the stevedore's and plaintiff's concurring fault. Plaintiff now asks me to reconsider my application of the "Murray Credit" doctrine, to reject it and then to readjust the award accordingly.

In refusing to reject the Murray Credit, I also note that under §905(b), an injured employee is given a certain right to compensation from his employer, the stevedore, regardless of the employer's fault or of his own contributory negligence. In addition, he has the right to proceed against third parties, in this case, the vessel and vessel owner, for their negligence. In my view, to permit the injured longshoreman to obtain a huge verdict and recover the entire amount from the vessel owner, notwithstanding the stevedore's

concurring negligence, is far more inequitable than it is inequitable to cut down his award to reflect his employer's negligence. 5/ I stand by my decision to reduce plaintiff's recovery according to the proportionate fault findings of the jury.

III.

DEFENDANTS' MOTION FOR J.N.O.V. OR, IN THE ALTERNATIVE, A NEW TRIAL

Oceanic and Andros Atlas also moved for j.n.o.v. pursuant to Rule 50(b), or, in the alternative, for a new trial under

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5/ Cf Dodge v. Mitsui Shintaku Ginko K.K. Toyko [sic], 425 U.S. 944; 528 F2d 669 (9th Cir. 1975), cert. denied (1976); London v. Lief Hoegh & Co., Inc., 521 F.2d 756 (2nd Cir. 1975), reh. denied; 424 U.S. 935 (1976).

Rule 59, [6] and presented multi-farious [sic] grounds in support of the motions. I will not repeat these grounds here, but will cite them as I discuss each one individually on the merits.

First of all, defendants argue that the overwhelming evidence established that Hess had the sole and exclusive responsibility to secure and maintain the gangway and its equipment and, therefore, under the law, the shipowner owed no such duty.

6/ Among the grounds most commonly raised in a motion for a new trial are the following: (1) the verdict is against the clear weight of the evidence; (2) the damages awarded are excessive; (3) the court erred in admitting or rejecting evidence or in or refusing to give instructions; (4) that there is newly discovered evidence and (5) conduct of the court or counsel tainted the verdict. Rela, supra, at 408. In the instant case, defendants assert grounds (1) and (3). For the most part, analysis will focus on the motion for a new trial since the grounds raised are grounds typically associated with a motion for a new trial and grounds which are insufficient to warrant the granting of a new trial would a fortiori not support a j.n.o.v.

I disagree. The evidence adduced at trial did establish a duty on the part of the shipowner and crew to secure and maintain the gangway. Plaintiff's expert, Captain David James, testified that good seamanship requires that the ship officers and crew make certain that the gangway is safely and firmly secured at all times and that a watch be posted in the gangway area as an additional safety precaution. James' testimony as to the duty of the vessel owner's crew to secure and maintain the gangway equipment was corroborated by statements to the same effect by the ship's captain and second officer, Captain Thalissimos.

This evidence was sufficient to establish a duty on the part of the ship owner, its officers and crew to secure and maintain the gangway. Accordingly, the jury verdict which found that defendants

did have a duty to secure and maintain the gangway and that defendants breached said duty was not against the clear weight of the evidence.

STANDARD OF CARE

The Court adopted §343 of the Restatement of Torts 2nd [7] as the appropriate theory of liability upon which

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7/ §343. Dangerous Conditions known to or Discoverable by Possessor

A possessor of land is subject to liabiltiy [sic] for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect them against it, and

(c) fails to exercise reasonable care to protect them against the danger.

defendants' duty to plaintiff was premised and instructed the jury accordingly. Defendants argue that application of §343 was erroneous under the present state of law in this Circuit.

Under the 1972 amendment to the LAWCA [8/] an injured longshoreman may no longer recover from the vessel for breach of an implied warranty of seaworthiness as he formerly could. However, the longshoreman's action for negligence against the vessel was preserved. Unfortunately, §905(b) did not specify the standard of care to which the vessel may be held and herein lies the problem. As aptly noted

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8/ §905(b) provides in pertinent part:
In the event of injury to a person covered under the [sic] chapter caused by the negligence of a vessel, then such person ...may bring an action against such vessel as a third party...The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies.

by one Court, "the legal waters surrounding the question of the proper standard (of care) have swirled turgidly with confusion and controversy." Dougherty v. Haaland, 457 F. Supp. 860, 863 (E.D.Pa. 1978).

This Circuit, relying on legislative history to the amended §905(b) [9/] has directed Courts to apply land-based negligence principles in establishing the relevent [sic] standard of care under §905(b).

9/ For example, the House Report stated: The Committee believes that where a longshoreman or other worker covered under this act is injured through the fault of the vessel, the vessel should be liable for damages, just as land based third parties in non-maritime pursuits are liable for damages, when through their fault, a worker is injured. Under this standard...there will be of course disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through application of accepted principles of tort law and the ordinary process of litigation. H.R. Rep.No. 1441, 92nd Cong, 2d Sess. (1972) reprinted in 3 U.S.Code Cong. & Ad. News, pp. 4698, 4702-04 (1972).

Hurst v. Triad Shipping Co., 554 F.2d 1237, 1246-47 (3d Cir.) cert. denied; 434 U.S. 861 (1977). Further, the Courts have looked to the Restatement of Torts 2nd as the national expression of non-maritime tort principles.

The problem remains--which sections of the Restatement of Torts, Second, are appropriate to base a theory of liability. I recognize that recent Third Circuit cases have indicated disfavor with the application of §343 in a longshoreman's §905(b) action against a vessel owner. However, I am of the opinion that none of the relevant precedents of this Circuit specifically rejected §343, but rather, found it inapplicable to the particular factual situation before them. 10/

10/ See Judge Garth's discussion starting on page 41 of the slip opinion in Rich v. United States, supra. See, generally Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), cert. denied, 430 U.S. 969 (1977); Marant v. Farrell Lines. Inc., 550 F.2d 142 (3d Cir. 1977); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir.) cert. denied, 434 U.S. 861 (1977).

Further, I found Judge Garth's argument for application of this section in Rich v. United States Lines, Civil No. 78/1251 (3d Cir. March 6, 1979) very persuasive and adopted his rationale in my decision to instruct the jury under §343. 11/

To briefly restate Judge Garth's analysis in Rich, he began by noting that it is necessary to hold the vessel accountable for its negligence notwithstanding the stevedore's concurring negligence in order to effectuate the congressional intent that the vessel exercise the same care to provide a safe place to work as a land based person must

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11/ It should be noted that several of the Circuits have upheld imposition of vessel liability under Sections 343-343A of the Restatement, Second, See e.g. Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2nd Cir. 1978), cert. denied; 47 U.S. L.W. 3301 (Oct. 31, 1978); Samuels v. Empresa Lineas Martimas Argentinas, 573 F.2d 884 (5th Cir. 1978); Anuszewski Dynamic Mariners Corp., Panama, 540 F.2d 757, 759 (4th Cir. 1976) (per curiam) cert. denied; 429 U.S. 1098 (1977).

do. (Slip Opinion at 34.) He recognized that a Court must not impose liability upon the vessel on the basis of a non-delegable duty doctrine, and that primary responsibility for the safety of the longshoreman with respect to the stevedore's equipment operations must be placed on the stevedore. (Slip Opinion at 35.) In Judge Garth's view, this could be effectuated by drawing a distinction between (1) the condition of the vessel as turned over to the stevedore and as affected by subsequent activities of the vessel's crew and (2) the activities of the stevedore and its employees or the condition or type of gear utilized by the stevedore. Judge Garth concluded:

> "With respect to the condition of the vessel, I believe Congress intended the vessel to be held to the same duty a landowner owes to business invitees... and §343 specifies the duty owed to the possessor of land to his invitee with

> respect to dangerous conditions known or discoverable by the possessor." Slip Opinion at 36.

With regard to this case, the evidence has convinced me that a ship's gangway is the "front door" of the ship. In fact, it may well be the only door. When a ship is swinging on its anchor or tied up to a dock, the gangway is the only means of access short of climbing up the anchor chain or "hand-over-handing" it on her mooring lines. Thus, once a gangway is put into place, whether the gangway is owned by the ship or by the stevedore, it becomes an integral part of the ship. Good seamanship requires that the gangway be secured. It should be just as firm and secure as the life rail stanchions which border the deck to prevent persons from falling off. It should be just as firm and secure as any other ladder or companionway on board the ship. I cannot imagine that any ship's officer would

ever say that "once we tie up to a dock, the stevedore has sole control and responsibility for the gangway." True, the stevedore may have the duty to furnish a gangway, or to place it, but the ship's crew, as brought out in the evidence in this case, has the responsibility to see that the ship and gangway are "secured together as one" so that anyone can board or leave the ship safely.

Section 343 of the Restatement (Second) of Tort specifies the duty owed by a possessor of land, which is analogous to the vessel owner, to his invitees--a classification under which the longshoreman clearly falls, with respect to dangerous conditions known to or discoverable by the possessor (vessel owner). I feel that the application of this provision accords with the Congressional intent of "encouraging safety because the vessel will still be required to exercise the same

care as a land based person in providing a safe place to work." Rich, supra at 38. Further, as noted by Judge Garth in Rich, impunity from this provision would, "in contravention of congressional design, place the vessel in a preferred position to the land based person." (Slip opinion at 38.)

Finally, defendants argue that its requested instructions, which I denied, should have been applied as the law in this case. I need spend little time addressing myself to this contention. Briefly, all of the requested by denied instructions set forth theories as to the scope of the vessel owner and stevedore's duty. As I stated in an earlier portion of this Opinion, the question of the proper standard of care is unclear under the present law and I choose to adopt §343 as the most appropriate theory of liability under the facts in this case.

Further, it should be noted that some of the requested but denied instructions were merely longer versions of the requested but denied instructions were merely longer versions of the principle that "the primary responsibility for the longshoreman's safety was on the stevedore" --as the jury was explicitly instructed in the instant case. Since I so instructed the jury that the primary responsibility for the longshoreman's safety was that of the stevedore, it is fair to assume that the jury, from all of the evidence before it, felt that the ship's crew still had some responsibility and that it either disregarded or neglected that responsibility, which accounted for

at least one half of the blame for the accident.

DATED: June 8, 1979.

_____

WARREN H. YOUNG, JUDGE

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS

DIVISION OF ST. CROIX

LAWRENCE A. SARAUW,	:	CIVIL NO. 1978/57
Plaintiff	:	
vs.	:	
OCEANIC NAVIGATION CORPORATION and VLCC ANDROS ATLAS, Defendants	:	

O R D E R

In accordance with the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby

ORDERED that plaintiff's, Lawrence Sarauw's, motion for judgment notwithstanding the verdict and to amend the judgment be denied. It is hereby further

ORDERED that defendants', Oceanic Navigation Corporation and VLCC Andros

Atlas', motion for judgment notwithstanding the verdict, or, in the alternative, a new trial be DENIED.

DATED: June 8, 1979.

ENTER:

WARREN H. YOUNG, JUDGE

ATTEST:

EDGAR D. ROSS, CLERK

By: _____
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1641

McCARTHY, William

vs.

SILVER LINE, LTD. and
SILVER BULK SHIPPING, LTD.

Silver Bulk Shipping, Ltd.,
Appellant

(D. C. Civil No. 78-1484)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, GARTH and SLOVITER,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on December 5, 1980. This Court affirmed the judgment of the said District Court. The Supreme Court of the United States granted a petition for writ of certiorari

and vacated and remanded this Court's judgment for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981).

On consideration whereof, it is now here ordered and adjudged by this Court that this Court's judgment entered December 12, 1980, be and the same is hereby reaffirmed and the judgment of the said District Court entered March 19, 1980, be and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Clerk

October 20, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2159/78-2161

THOMAS W. GRIFFITH

vs.

WHEELING-PITTSBURGH STEEL CORPORATION and
AMERICAN COMMERCIAL LINES, INC.

THOMAS W. GRIFFITH,
Appellant in No. 78-2159

Wheeling-Pittsburgh Steel Corporation,
Appellant in No. 78-2160

American Commercial Lines, Inc.
Appellant in No. 78-2161

(D. C. Civil No. 73-0706)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, WEIS and
HIGGINBOTHAM,
Cirguit Judges

REINSTATED JUDGMENT ON REMAND
FROM THE SUPREME COURT
OF THE UNITED STATES

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on June 7, 1979 and was later remanded from the Supreme Court of the United States.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered June 15, 1978, be, and the same is hereby modified so as to provide that American as owner is jointly liable to Griffith for $209,299.45; and the said judgment is hereby vacated insofar as it determines that Wheeling was liable as an owner pro hac vice, and the cause is remanded for a redetermination, on all the evidence presented, of Wheeling's ownership status, all in accordance with the opinion of this Court.

Costs are taxed in favor of Griffith against American, but Wheeling and American shall between themselves bear their own costs.

ATTEST:

August 11, 1981

Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 78-2159, 78-2160 and 78-2161

THOMAS W. GRIFFITH,
Appellant in No. 78-2159
Appellee in Nos. 78-2160/61

vs.

WHEELING-PITTSBURGH STEEL CORPORATION
Appellant in No. 78-2160
Appellee in Nos. 78-2159 and 78-2161

vs.

AMERICAN COMMERCIAL LINES, INC.,
Appellant in No. 78-2161
Appellee in Nos. 78-2159/60

On Remand From The Supreme Court
of the United States
No. 79-813

Before: GIBBONS, WEIS and HIGGINBOTHAM,
Circuit Judges

Upon the consideration of the appellant American Commercial Lines' petition for rehearing before the original panel,

It is O R D E R E D that the petition for rehearing before the original panel is denied.

By the Court,

_____
Circuit Judge

Dated: September 11, 1981

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2076

LAWRENCE A. SARAUW

vs.

OCEANIC NAVIGATION CORPORATION
and VLCC ANDREAS ATLAS,

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS,
Appellants

(D. C. Civil No. 78-0057)

ON REMAND FROM THE SUPREME COURT OF THE
UNITED STATES (No. 80-245)

ON APPEAL FROM THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX,
CHRISTIANSTED JURISDICTION

Present: ADAMS, MARIS and SLOVITER,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and a judgment was entered by this Court on May 20,

1980. On May 4, 1981, the Supreme Court of the United States granted a petition for writ of certiorari, vacated this Court's judgment and remanded for reconsideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981). The cause on remand was submitted on briefs June 8, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of this Court entered May 20, 1980, be, and the same is hereby reinstated in accordance with the opinion of this Court.

ATTEST:

Clerk

July 31, 1981

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1380

Joseph S. Harris,

Appellant,

v.

H. Schuldt Reederei,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

Submitted:
June 17, 1981

Decided:
August 11, 1981

Before WINTER, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

C. Arthur Rutter, Jr., John H. Klein (Breit, Rutter & Montagna on brief) for Appellant. Charles R. Dalton, Jr., Michael F. Leban (Seawell, McCoy, Dalton, Hughes, Gore & Timms on brief) for Appellee.

PER CURIAM:

This case is before us for a second time. In our first opinion, we affirmed the judgment of the district court entered on the jury's verdict for defendants in this action under section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §905(b). Harris v. Reederei, 596 F.2d 92 (4 Cir. 1979). The Supreme Court granted certiorari and remanded the case to us for further consideration in light of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. _____ (1981). Harris v. Reederei, No. 78-1851 (May 4, 1981). Following remand, each of the parties has moved for summary disposition in his favor. We grant plaintiff's motion and reverse and remand the case to the district court for a new trial.

Joseph Harris, a longshoreman, injured his hand while loading hogsheads

of tobacco aboard the vessel Mexican Trader in December 1975. Though the facts surrounding the injury are disputed, evidence was produced at trial to show that the injury resulted from a defect in a winch which was part of the ship's equipment, that the defect was brought to the attention of a ship's mate, and that the mate instructed the longshoreman to continue loading until he could have the winch repaired.

Harris sued the shipowner under §5(b) of LHWCA after having collected his statutory workmen's compensation benefits from his employer, Southern Stevedoring Corp. At trial, the district court instructed the jury that a shipowner has the duty to warn business invitees such as Harris of "latent or hidden dangers," but that:

> The shipowner has no duty to warn of conditions of the vessel which are open, obvious or comprehensible to any reasonable person exercising reasonable care.

The district court refused to give plaintiff's proffered instruction, based on §343A(1) of the Restatement (Second) of Torts, that:

> The defendant is not liable to a lonshoreman such as plaintiff for physical harm caused to them by any activity or condition on the vessel whose danger is known or obvious to them, unless the defendant should anticipate the harm to the longshoreman despite such knowledge or obviousness.

The jury returned a verdict for defendant shipowner.

In Scindia Steam Navigation Co. v. De Los Santos, supra, a longshoreman was injured allegedly as a result of a defective ship's winch which was being operated by other longshoremen, none of whom were members of the ship's crew. The district court granted summary judgment for the shipowner, finding that, even if the condition of the winch was known to the shipowner, the condition was open and obvious to the longshoremen and the

shipowner was therefore relieved from liability as a matter of law. The Ninth Circuit reversed, holding that the shipowner had a continuing duty to exercise reasonable care to discover and correct any conditions posing an "unreasonable risk" of harm to longshoremen.

The Supreme Court affirmed, but adopted only a portion of the reasoning of the Court of Appeals. The Supreme Court first rejected the notion that, once loading operations had been entrusted to the stevedore, the shipowner bore a continuing duty to inspect and discover dangerous conditions. However, the Court also rejected the district court's view that the shipowner could not be liable where a danger was open and obvious to longshoremen. Without offering a precise definition of the standard of care a shipowner owes to longshoremen under

LHWCA,[1] the Court stated:

> [W]hether [the defective winch] could be safely used or whether it posed an unreasonable risk of harm to . . . longshoremen was a matter of judgment committed to the stevedore in the first instance. . . .
>
> Yet it is quite possible, it seems to us, that [the stevedore's]

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[1] The Court first paraphrased the approach of the Second Circuit, which, like plaintiff's proposed instruction in the instant case, is based on §343A of the Restatement:

> [M]ere knowledge of the danger would not be sufficient in itself to fasten [a duty to intervene and repair] on the shipowner, but if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard.

49 U.S.L.W. at 4410, citing Evans v. S. S. Campeche, 639 F.2d 848 (2 Cir. 1981). The Court stated that it was "presently unprepared to agree that the shipowner has precisely the duty described by the Court of Appeals." 49 U.S.L.W. at 4410.

> judgment in this respect was so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

49 U.S.L.W. at 4410-11.

We find that the instruction given by the district court in the instant case was clearly inadequate under Scindia. The instruction reflected the view, explicitly rejected in Scindia, that a shipowner owes no duty to longshoremen with respect to open and obvious dangers. The Restatement view, as embodied in the instruction requested by Harriss--that a shipowner is not liable unless he should anticipate harm to longshoremen despite the obviousness of the danger--is consistent with the duty suggested by the Supreme Court in Scindia, although the

Court did not specifically approve that precise formulation. The proffered instruction certainly provided a statement of the law sufficiently accurate to require the district court to charge it, or something similar, to the jury.[2]

There is no doubt that plaintiff was entitled to the instruction he requested. There is evidence in the record from which a jury might have concluded that an agent of shipowner was aware of the defect, was aware that work would continue and in fact instructed work to continue despite the defect, and took no

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[2] We see little practical difference between the proffered instruction--imposing liability where the shipowner "should anticipate harm" to longshoremen--and that which might be constructed by drawing on the language of Scindia--imposing liability where the shipowner "should have realized the winch presented an unreasonable risk of harm." If anything, the Scindia language is more favorable to Harris than the instruction he requested.

action to correct it. Under a proper instruction, a jury might reasonably conclude that the winch presented an unreasonable risk of harm and that the shipowner is therefore liable for his failure to take corrective action. We must therefore conclude that the failure to give the instruction was not harmless error.[3]

REVERSED AND REMANDED

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[3] In our original opinion, we rejected Harris's contention that the district court should have instructed the jury that amounts he received in workers' compensation benefits would have to be repaid to his employer out of any award he received. Scindia has no application to that holding.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellees,	)	
v.	)	NO. 77-3645
MAMMOTH BULK CARRIERS, LTD., Defendant-Appellant.	)	
TWIN HARBOR STEVEDORING CO., Intervenor.	)	
JAMES D. BACHTEL and DONNA BACHTEL, Plaintiffs-Appellants.	)	
v.	)	NO. 77-3043
MAMMOTH BULK CARRIERS, LTD., Defendant-Appellee.	)	ORDER
TWIN HARBOR STEVEDORING CO., Intervenor.	)	

Appeal from the United States
District Court
Western District of Washington

Before: KILKENNY and SNEED, Circuit Judges, and WATERS, District Judge.*

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* The Honorable Laughlin E. Waters, United States District Judge for the Central District of California, sitting by designation

The Supreme Court of the United States having vacated the judgment of this court and remanded for further consideration in the light of Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. _____ (April 21, 1981), and Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980), and it being our considered conclusion that the instructions in the district court do not conform with the requirements of Scindia Steam Navigation Co., Ltd. v. De Los Santos, supra and that a new trial is necessary,

Accordingly, it is ORDERED that the judgment of the district court be set aside and that this case be remanded to the district court for further proceedings consistent with the opinion of the Supreme Court in Scindia Steam Navigation Co., Ltd. v. De Los Santos, supra.

Copies of the mandates are attached.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3359

MRS. MARIA TOTH FUTO, in her capacity as the personal representative and administratrix of the estate of John Futo,

Plaintiff-Appellant,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Intervenor-Appellant,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Defendant-Appellee.

Appeal from the United States
District Court for the
Eastern District of Louisiana

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

(July 21, 1981)

Before: GEE, HENDERSON, and HATCHETT,
Circuit Judges.

PER CURIAM:

By order of May 4, 1981, the Supreme Court of the United States reversed the judgment of this court in the above-styled matter and remanded it to us for further consideration in light of Scindia Steam Navigation Co., Ltd. v. De Los Santos, 49 U.S.L.W. 4405 (April 21, 1981).

IT IS ORDERED AND ADJUDGED that the above-styled case be remanded to the United States District Court for the Eastern District of Louisiana for further proceedings consistent with Scindia.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1244--September Term, 1980

(Argued April 24, 1981
Decided August 21, 1981)

Docket No. 81-7006

ORAZIO ALBERGO,

Plaintiff-Appellant,

v.

HELLENIC LINES, INC.,

Defendant-Appellee.

Before:

LUMBARD and OAKES, Circuit Judges,

and POLLACK, District Judge.*

Appeal from an order and judgment of the United States District Court for the Southern District of New York (Sweet, J.) setting aside a verdict for the plain-

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* Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

tiff-longshoreman for damages in his favor against the vessel on a finding of negligence in an action brought pursuant to the third party liability provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §904(b). Affirmed.

MORRIS CIZNER, New York, New York (Zimmerman & Zimmerman, New York, New York, Attorneys) for Plaintiff-Appellant.

EDWIN K. REED, New York, New York (Robert Alexander Hulten, of counsel, Zock, Petrie, Reid & Curtin, Attorneys) for Defendant-Appellee.

POLLACK, District Judge:

Orazio Albergo, a longshoreman employed by Hellenic Lines, Inc., tripped over loose lashing rope scattered on the deck of a ship being off-loaded by stevedores and fell suffering injury. Pursuant to §905(b) of the Longshoremen's

and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950 (1976), Albergo brought this third-party negligence action against the vessel owner in the United States District Court for the Southern District of New York. After a five day trial, the jury returned a verdict of $80,000 in favor of Albergo and found that plaintiff's negligence contributed to the accident to the extent of 25%. Judge Sweet set aside the jury's verdict and granted judgment N.O.V. to the defendant dismissing the complaint on the grounds that the open, obvious and known scattering of loose cuttings of lashing rope on the deck which plaintiff himself had pushed aside with his hand just before the accident did not present a negligent condition in the work area or pose an unavoidable danger to the stevedoring crew and their operation and could not legally support a charge of negli-

gence against the vessel. Plaintiff appeals. We affirm.

Plaintiff, 58 years of age at the time of the accident, started out as a winch operator in stevedoring operations but due to an injury in 1956 in that capacity he became a stevedore's deckman. The accident sued on is plaintiff's fourth instance and claim of injury as a longshoreman.

On April 24, 1978 defendant's vessel, the Hellenic Leader, was discharging cargo at a pier in Brooklyn, New York using plaintiff and other longshoremen as deckmen employed by Hellenic Lines in its stevedoring capacity. The men started work at 8 A.M. on that day. Their task initially was to rig up and remove deck cargo consisting of containers and cartons from the main deck, located inshore and offshore. The cargo was lashed together with "skinny ropes" [so styled by

plaintiff] that were cut from the containers by the ship's crew during the stevedoring operation; the cuttings were left strewn on the deck. The lashings on the offshore deck cargo were cut by the ship's crew while the longshoremen worked the inshore deck cargo, to ready the offshore containers to be moved. There were two or three vans on the offshore side. The cuttings were open and obvious to the longshoremen. This was not an unusual way of unlashing cargo; plaintiff testified that on other occasions he had seen crews leaving cuttings of such ropes on the decks.

Having completed the removal of the inshore cargo, the stevedores moved to respot the up and down boom to the offshore side. However, the work plan was changed before the offshore containers were moved; the men were told to leave the offshore deck cargo for later on and

instead, to raise the cargo from the hold in Hatch #5. In the respotting process the preventer guy was slacked off so that plaintiff could fasten it to the deck (through a pad-eye). Plaintiff shackled the preventer guy to the deck and the slack was taken up. He was then told to recheck the fastening and did so and in turning away from the preventer, the fall, which caused this law suit, occurred.

Though the testimony was imprecise and vague concerning the manner of the occurrence, leaving much to the imagination, the evidence showed that prior to initially fastening the preventer guy to the deck, the plaintiff found lashing rope cuttings from the containers strewn in that part of the deck area where the preventer was to be fastened and he swept these "skinny rope" cuttings aside with his hand from the place where he had to

do the shackling which he testified he did "just to clean up that very area there, just to move the shackling through the pad-eye." The guy was then loosened up by the winchman and the plaintiff turned the lock down on the preventer, the boom was raised and it was stopped when it reached the top and was fast and the plaintiff then locked up the guy. Plaintiff stood up and told the signalman that it was okay. He was asked by his co-worker to "give it another check". Plaintiff gave the guy a second check in the very area from which he had just swept away the rope, and then announced, "It's okay, it's locked". Plaintiff then turned around to leave that very area he had cleared but according to his testimony he nevertheless tripped on some rope and fell down. Plaintiff testified that when he went into this area there were rope cuttings in between and around his

feet and that he moved some of it so it wouldn't be over the shackle. He testified he had seen it before; "we worked on ropes all morning." When he got to the timekeeper's office he told him that he had tripped over a pad-eye covered with lashings.

The crux of the claim of negligence against the vessel is whether the presence of rope cuttings on the deck that plaintiff undertook to move with his hand to clear his work space can legally support a charge of third-party negligence against the vessel. Loose rope as such has no inherent mobility or dangerous propensities--not tied down, and left lying under foot openly and obviously it does not, in and of itself on a ship, pose an unreasonable risk of harm. As a matter of law a charge of negligence of the vessel can only be predicated on hazardous conditions or circumstances and

not on ordinary clumsiness of movement of the longshoreman. The case might be different under the discarded theory of unseaworthiness which was a liability of a vessel eliminated in 1972 by the Harbor Workers' Compensation Act, 33 U.S.C. §905, et seq. during cargo operations.

In his opinion the Judge said

> as a matter of law the ship is not required to provide an immaculate working place, see Giglio v. Farrell Lines [613 F.2d 429 (2d Cir. 1980)]; Hickman v. Jugoslavenska Linijsk Plovi ba Rigcka, Zvir, 570 F.2d 449 (2d Cir. 1978), and if there is ever anything to be expected aboard a vessel, it is a line. There is simply no basis in fact upon which a jury could conclude that the cut line was a dangerous condition that the ship could reasonably conclude could not be avoided, particularly since Albergo had in fact avoided it once.

The Judge went on to say

> . . . There is but one conclusion reasonable men could have reached here: that is, that Hellenic could reasonably have expected Albergo to avoid the cut line. Since Albergo could

> have avoided the cut line, Hellenic, in failing to remove it, did not deviate from the standard of care imposed upon it by the law of this Circuit.

The place of plaintiff's employment was an area in which the law has imposed on the stevedore the primary obligation, as a matter of "Housekeeping", to "be kept reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards". 29 C.F.R. §1918.1(a) [OSHA]. The duty to clear away any loose debris when that can be done as plaintiff did it here, is placed squarely on the stevedore employer, not the vessel owner. Thus, the danger to be perceived, if any, spells the duty of the stevedore to be observed. With the duty on the plaintiff's employer it would be contradictory to suggest that loose debris of the sort here involved, so easily removable as it was here, by hand, can establish liability for negligence on the part of the

vessel owner. The longshoreman is adequately protected by looking to his employer for compensation when injured by accident. Evans v. Transportacion Maritime Mexicana SS "Campeche", 639 F.2d 848 (2d Cir. 1981) held that the ship onwer could consider the stevedore to be primarily responsible for the safety of the longshoremen and to be obligated to take whatever steps are necessary to correct even an "unsafe" condition aboard the ship. Thus, this is a case, where on the testimony adduced, it must be said that as a matter of law there was no factual or legal basis for an anticipation by the ship that the plaintiff would be unable to avoid the claimed hazard despite its obviousness and the way he himself dealt with it.

The appellee cogently argues that a vessel owner is entitled, as a matter of law, to anticipate that the stevedore and

his longshoremen will abide by the OSHA regulations in such a case, and take whatever steps are necessary to correct an untidy condition aboard the ship; otherwise, longshoremen such as appellant, will know they can ignore the statutes, receive compensation from the stevedore and then try for even more money by suing the vessel owner. Appellee correctly says that, "Misplacement of the statutory standard will destroy the 'delicate balance' for safety which . . . Congress sought to establish . . . and adjust the ship owner's liability to that of an insurer". As stated by this Circuit in Evans, 639 F.2d at 852:

> Finally, Congress made clear that the stevedore is to have the primary responsibility for the safety of the longshoremen. Section 941 requires the stevedore to "furnish and maintain employment and places of employment which shall be reasonably safe for his employees" and to comply with the regulations promulgated under the Act. 33 U.S.C. §941(a) (1976).

The simple act performed by the plaintiff of moving the skinny rope cuttings aside with his hand from the area where he had to shackle, which was the area of the accident, eloquently strikes down any notion of the existence of a negligent condition for which the vessel owner could be held in damages. As a matter of law there was no such negligent condition nor any basis for anticipation that the longshoreman could not avoid the rope in this case--certainly not one remaining at any time after plaintiff cleared the untidy condition impeding him.

Judgment affirmed.

OAKES, Circuit Judge (dissenting):

I respectfully dissent.

I adhere to what I said in my dissenting opinion in Giglio v. Farrell

Lines, Inc., 613 F.2d 429, 436 (2d Cir. 1980). I there pointed out that the trial judge's construction of the Safety and Health Regulations for Longshoring (there 29 C.F.R. §1918.91(c), here 29 C.F.R. §1918.91(a)), also relied upon by the panel majority here, does not impose an exclusive duty upon stevedores. See Lubrano v. Royal Netherlands Steamship Co., 572 F.2d 364, 373-74 (2d Cir. 1978) (Moore, J. dissenting); see also Canizzo v. Farrell Lines, Inc., 579 F.2d 682-88 (2d Cir. 1978) (Friendly, J. dissenting), cert. denied, 439 U.S. 929 (1978). The Safety and Health Regulations specifically provide that they do not relieve vessels "from responsibilities or duties now placed upon them by law, regulation or custom." 29 C.F.R. §1918.2(b). If the stevedore and his employees are contributorily negligent, the liability recovery against the vessel may be re-

duced under the principles of comparative negligence, but not eliminated. See Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 508 (2d Cir. 1976).

Here as in Giglio it was the ship's duty as substantiated by the Joint Maritime Safety Code prepared by New York Shipping Association, Inc., International Longshoremen's Association, and the Port of New York Joint Safety Committee, with an effective date of January 1, 1970, of which the trial court took "judicial notice," to keep the "[w]eather deck, walking and working areas . . . reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards." See Part Q. Moreover, under Part C of the Code:

> The owner, master and officers of the vessel shall supply and maintain in safe condition for use all ship's gear, equipment, tools and work spaces which are to be used in stevedoring operations. (Emphasis added).

In my view, as I said in the Giglio dissent, supra, 613 F.2d at 438, the Safety Code qualifies under the Safety and Health Regulations as a regulation or custom for the maritime industries in the Port of New York. Moreover, the union contract with the New York Shipping Association in evidence states that the Joint Safety Code must be followed, and Hellenic Lines was a signatory to this contract. As the trial court indicated, the appellees could not disclaim knowledge of the New York standard of case in the maritime industry because it was a participant in one of the two organizations propounding the Safety Code Regulations.

In short the vessel did not comply with its duties under the Safety Code. Its duty exists independent of the stevedore's own duties under the OSHA regulations. The majority opinion speaks

without any reference to the Joint Safety Code whatsoever and certainly disregards its impact on this case.

I note that Judge Sifton's concurring opinion in Giglio v. Farrell Lines, supra, at least implies that the ship's responsibility is not secondary to that of the stevedore, 613 F.2d at 436, and while our rules prevent my citation as authority to Irizzary v. Companie Maritime Navegacion Netumar S.A., 628 F.2d 1344 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3824 (U.S. May 4, 1981), since it was not a published opinion, I believe it is proper to note that in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 49 U.S.L.W. 4405, 4411 n.25 (U.S. Apr. 21, 1981), the Irizzary decision's holding that the Joint Safety Code was a custom or practice within the OSHA Safety Regulations was "note[d] with some interest" by the Supreme Court but not ruled

upon. Certainly until the Supreme Court rules otherwise, the point I made in the Giglio dissent is an open one.

Following the analysis there set forth, 613 F.2d at 436-37, the question then becomes whether in the exercise of reasonable care the ship should have cleaned up the loose lines. See Napoli, supra, 536 F.2d at 509; Restatement (Second) of Tort §343A. This court's own decision in Lopez v. A/S D/S Svendborg, 581 F.2d 319 (2d Cir. 1978), as well as Napoli itself, permit the imposition of liability, on a comparative negligence basis, on the vessel for dangers obvious to the stevedore, where as here custom or practice (The Joint Safety Code) makes the vessel responsible and the longshoreman relies on the vessel to eliminate the danger. Here there was ample evidence for the jury to find, as it did find, that Albergo did so rely. He was working

in close quarters with maybe a "foot, foot and a half" between the ship's rail and the van where the pad eye for the schooner rope was located. "It wasn't [his] job to [push the loose rope to one side]". His fellow worker, Tony Lavadera, had previously told the mate to clean up the deck because it was the ship's job and the loose ropes left a dangerous condition--as Albergo himself described it, "like when you walk on the snow."

Under what I think was basically a proper charge the jury found the vessel negligent, its negligence the proximate cause of the accident, and Albergo twenty-five per cent contributorily negligent. I believe the law requires that the jury verdict stand.

Purely as an aside, I fail to understand the relevancy of the majority's point that Mr. Albergo had three previous claims for injury. I do not find this in

the slightest surprising; the man was fifty-eight years old at the time of this accident, he had been a longshoreman for twenty-nine years, and it is well known that a longshoreman's work is one of the most hazardous of any. The present case is simply another example. A longshoreman is expected to step over 20 to 30 loose pieces of rope totalling some 300 to 400 feet in length thrown haphazardly in a narrow little space to loosen and resecure the preventer on a padeye to respot the up and down boom so that the men could work in the hold. It was the ship's equipment to be secured to the padeye. The ship knew some longshoreman would have to go into the narrow space with the loose rope obstructions but did nothing. Thus, Albergo's fourth claim, which the majority now denies. Only its merits are relevant, I think.

Opposition

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No. 81-826

IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN COMMERCIAL LINES, INC.,
Petitioner,

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents.

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS,
Petitioners

v.

LAWRENCE A. SARAUW,
Respondent

SILVER BULK SHIPPING, LTD.,
Petitioner

v.

WILLIAM McCARTHY,
Respondent

On Writ of Certiorari To the United States Court of Appeals For the Third Circuit

RESPONDENT THOMAS W. GRIFFITH'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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THE QUESTION PRESENTED FOR REVIEW

Should this Court review an opinion of the United States Court of Appeals for the Third Circuit that deals with a factual setting strikingly dissimilar from the decision of this Court in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. ——, 101 S. Ct. 1614 (1981), but that is faithful to the broad standards of care enunciated in *Scindia.*

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COUNTER-STATEMENT OF THE CASE

On May 26, 1973, Respondent Thomas W. Griffith was thrown into the hold of a barge and seriously injured. The barge, Number 2730, was owned by American Commercial Lines, Inc., and had been dispatched to Wheeling-Pittsburgh Steel Corporation, the Respondent's employer, pursuant to a telephone request. The injury occurred because the rails upon which the barge covers rode were bent, and as a consequence, the covers did not roll freely; instead, they had to be forced closed with the use of cables attached to a crane.

Before the barge was delivered, it was inspected by an employee of American Commercial Lines, Inc., Franklin Merritt, sometime between May 17 and May 23, 1973, at a landing maintained by American Commercial Lines, the vessel owner. Barge 2730 had been damaged and repaired on numerous occasions before it was delivered to Wheeling-Pittsburgh Steel Corporation, and the barge owner had repair and maintenance documents that evidenced the long history of repair work performed on the barge because of its damaged condition. Therefore, Merritt's inspection of the barge before delivery was of considerable importance.

When Franklin Merritt inspected Barge 2730, on behalf of American Commercial Lines, Inc., the covers on the barge were closed. As a result, he could not determine the condition of the rails over which the covers moved, or the wheels that moved the covers. He did not perform an "operating inspection" of the covers, attempting to move them to determine if they moved freely.

At the time that Merritt performed his inspection for American Commercial Lines, Inc., he had repair equipment available to him that could have been used to correct damaged or balky covers. He also knew that

once the barge was delivered to Wheeling-Pittsburgh Steel Corporation, the latter company had no facilities to repair a defective cover.

Franklin Merritt, the employee of the shipowner, also had advance knowledge that the practice at Wheeling-Pittsburgh Steel Corporation was to use a double cable sling method of dislodging a stuck cover.

At the time that American Commercial Lines delivered its barge to Wheeling-Pittsburgh Steel Corporation, on May 23, 1973, the wheels and track mechanisms on which the barge covers moved were rusty, bent, and without lubrication. As a result, the barge covers were hard to move and had a tendency to stick.

Rather than this condition being "open and obvious," the defective condition of the cover mechanism was hidden, and not detectable until the stevedore, Wheeling-Pittsburgh Steel Corporation, attempted to operate the covers. Because the unsafe conditions could not be detected until the covers were moved, Merritt had not discovered them on his perfunctory visual inspection and the stevedore could not discover them until beginning their work with the covers.

On the day of the accident, Barge 2730 was moved into position next to the landing to be loaded. When the longshoremen employed by Wheeling-Pittsburgh Steel Corporation attempted to open the covers, preparatory to loading the barge, they encountered difficulty due to the conditions described previously. At about 2:00 p.m., their foreman directed the crew to stop loading the barge and to close the covers. One of the covers stuck, and attempts to move it failed. A cable was at-

tached from a crane on the seawall to the cover to pull the cover closed. A second cable was attached to an adjacent cover for leverage. Because eyelets were missing on the stuck cover, a hook from the cable was attached to the lip of the cover; Griffith was standing on the cover to maintain the hook in place. When tension was applied to the cables, the cover moved upward, throwing Griffith into the hold of the barge and injuring him.

The District Court, in a non-jury trial and sitting as fact-finder, found in favor of Griffith, and against both the shipowner and the owner *pro hac vice,* his employer. Of great significance, the District Court as fact-finder, determined that the shipowner was negligent in delivering a barge in a defective condition, with cover mechanisms that were rusted, bent, and had missing eyelets. (452 F. Supp. at 845). In addition, the District Court found the shipowner liable for these deficiencies regardless of whether the standard of Restatement (Second) of Torts, §§343 and 343A, or the standard of "reasonable care" was applied. (452 F. Supp. at 844, 845).

The Third Circuit affirmed the judgment against American Commercial Lines, Inc., the shipowner, and vacated and remanded the case for further findings on Wheeling-Pittsburgh's status as an owner *pro hac vice.* (App. 41). The Third Circuit concluded that the factual determinations of the District Court were not "clearly erroneous," and that there was "ample evidence" to support the findings of the District Court that American Commercial, the shipowner, knew or should have known of the defective condition of the covers, failed to correct them, and could have foreseen the action of the stevedore in responding to these deficiencies. 610 F.2d at 126.

Reasons for Denying the Writ.

On May 4, 1981, the Court granted a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, vacated the Third Circuit's judgment, and ordered the case remanded to the Third Circuit for further consideration in light of *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. ——, 101 S. Ct. 1614 (1981).

On remand, the Third Circuit carefully considered the decision of this Court, and found that the factual issues before this Court in *Scindia* differed from those in *Griffith,* and that nothing in *Scindia* demanded an alteration or reversal of the factual findings of the District Court in *Griffith.* Accordingly, the Third Circuit reinstated its judgment of August 24, 1979.

REASONS FOR DENYING THE WRIT

I. The Decision of the United States Court of Appeals in Griffith vs. Wheeling-Pittsburgh Steel Corporation, Although Dealing with a Dissimilar Factual Setting, Follows Faithfully the Principles Enunciated by This Court in Scindia Steam Navigation Co. vs. De Los Santos, 451 U.S. ....., 101 S. Ct. 1614 (1981).

The Third Circuit, in its *Griffith* opinion, was asked to review a determination by a District Court, in a non-jury proceeding, in favor of a longshoreman, and against the vessel owner and the stevedore. This fundamental consideration has important ramifications, particularly given the present posture of the case before this Court.

Because the initial proceeding was before the District Court, sitting as the finder of fact without a jury, the scope of review by the Third Circuit in *Griffith* was

severely limited to the question of whether or not the District Court's findings were "clearly erroneous"; the Third Circuit found that they were not, but were supported by "ample evidence." The essence of the *Griffith* opinion merely consists in the Third Circuit's conclusion that there was ample evidence to support the findings of the District Court that American Commercial, the shipowner, knew or should have known of the defective condition of its vessel, failed to exercise reasonable care to correct the condition, and that American could have anticipated the actions of the stevedore in response to the defects in the vessel. Consequently, unless this Court substitutes its judgment for these factual determinations, there is no reason to accept Petitioner's argument that the Third Ciruit should be directed to send *Griffith* back to the District Court, since it has already resolved the factual issues in the case.

In addition, the non-jury proceeding before the District Court means that there are no jury instructions that might be considered erroneous or misleading, in light of *Scindia,* and therefore require a new trial.

To further emphasize the conviction that Petitioner's argument for a return of *Griffith* to the District Court is frivolous, it is noteworthy that the District Court already has concluded, sitting as the trier of fact, that liability would attach to the shipowner in *Griffith* under either standard of liability considered by this Court in *Scindia,* whether a "reasonable care" standard, or the Restatement (Second) of Torts, §§343 and 343A standard is applied. See *Griffith vs. Wheeling-Pittsburgh Steel Corporation,* 452 F. Supp. 841, at p. 844; *Griffith vs. Wheeling-Pittsburgh Steel Corporation,* 610 F.2d 113, at p. 123. Since the opinions in *Scindia* differ basical-

ly over which of these tests should apply, and since the result in *Griffith* would be the same under either standard, remanding this case to the District Court would merely protract litigation for no useful purpose.

The factual matrix faced by this Court in *Scindia* is strikingly dissimilar from the factual setting that the Third Circuit faced in *Griffith*. In *Scindia*, this Court had to wrestle with the problem of a shipowner's liability for defects that develop during the stevedoring operation; the bedrock issue in *Scindia* is when and under what circumstances a shipowner becomes liable for defects that have their genesis during the stevedoring operation. Justice White, writing for the majority, made it clear that the principal focus of his opinion was a shipowner's duty towards a vessel "turned over to the stevedore in safe condition," in which "conditions dangerous to the longshoreman subsequently develop . . ." 101 S.Ct. at 1620.

The Third Circuit, in *Griffith*, however, was concerned with the duty of a shipowner to correct defects in a vessel that exist while the shipowner has possession of the vessel, has the sole means of repairing the deficiencies in the vessel, and is aware that once the stevedore receives the vessel, the stevedore would lack the facilities for repair.

In spite of the factual differences between *Griffith* and *Scindia*, it is possible to distill from the majority opinion in *Scindia* the effect of that decision on the *Griffith* fact setting. It is submitted that the *Griffith* opinion is perfectly consistent with the reasoning and language of *Scindia*.

Considering *Griffith* as strictly a case involving defects extant at the time that the shipowner delivers

the vessel to the stevedore, liability would rest upon the shipowner under the doctrinal theories of the majority opinion. In *Scindia,* this Court concluded that a shipowner owes a duty of "reasonable care under the circumstances" towards a vessel, and that Restatement (Second) of Torts, Sections 343 and 343A, "while not irrelevant, do not furnish sure guidance in cases such as this." 101 S. Ct. at 1622, N. 14. The duty of reasonable care does impose, *at the least,* a duty to warn of defects existing in the vessel at delivery, about which the shipowner knows or should know. 101 S. Ct. at 1622.

The portion of the majority opinion quoted above seems to have been the least controversial and to have sparked the least disagreement within this Court. In *Griffith,* there is no dispute that even this minimum duty of issuing a warning was not satisfied by the shipowner, and therefore, the end result of *Griffith* is perfectly consistent with this theory of liability.

The real thrust of the majority opinion in *Scindia,* and the focal point of disagreement, concerns the extent of the shipowner's duty toward defects that develop during the stevedoring operation. Even under these circumstances, where the stevedore is in possession when the defect in the vessel develop, the shipowner may be liable if "statutes, regulations or *custom* place or *assume* a continuing duty on the vessel to repair defective ship's gear . . ." 101 S.Ct. at 1626. (Emphasis Added)

If the facts in *Griffith* are twisted and stretched to their outer limits, so that *Griffith* is somehow construed as a case where the defects in the vessel first "develop" while the stevedore was in control, the majority opinion in *Scindia* would still impose liability upon

the shipowner in *Griffith*. It was previously pointed out that the American Commercial Lines, Inc., the shipowner, had repair facilities, but Wheeling-Pittsburgh Steel Corporation, the stevedore, lacked any means to repair the barge. In addition, American Commercial Lines, Inc., retained the right to repossess the barge, at any time, from Wheeling-Pittsburgh Steel Corporation, should repairs become necessary. These facts bespeak a customary method of operation that assumed that any repair work to the vessel would be performed by American Commercial Lines, the original shipowner.

From this review, it is patently clear that the Third Circuit had to treat a factual situation in *Griffith* that was not before this Court in *Scindia,* but that in resolving the issues in *Griffith,* the Third Circuit followed the teachings of this Court, and reached a result compatible completely with the *Scindia* opinion.

II. The United States Court of Appeals for the Third Circuit Has Not Undermined This Court's Interpretation of 33 U.S.C. §905(b) By Imposing a Non-Delegable Duty of Care on Vessel Owners.

Throughout the Petitioner's brief, there runs a recurrent theme that the Third Circuit has surreptitiously attempted to undermine this Court's interpretation of 33 U.S.C. §905(b) by saddling a vessel-owner with a non-delegable duty of care toward injured longshoreman. This argument of the Petitioner is totally misleading, and turns a blind eye on the leading decision of the Third Circuit in this field of law, *Hurst v. Triad Shipping Co.,* 554 F.2d 1237 (3rd Cir. 1977).

In its seminal decision in *Hurst,* the Third Circuit decided appeals taken by two longshoremen who were injured when a shoreside crane failed, causing parts of

the crane to fall. The lower court entered directed verdicts for the shipowner, and on appeal, the injured longshoremen squarely urged the Third Circuit ". . . to apply the standard embodied in maritime negligence cases of this court decided before the 1972 amendments of Section 905(b), which analyzed the tort on the basis of the shipowner's 'non-delegable' duty to provide a safe workplace for longshoremen—a species of liability without fault." 554 F.2d at 1246.

When faced squarely with the opportunity to adopt a position that the Petitioner now accuses it of clandestinely employing, the Third Circuit unequivocally rejected the concept of non-delegable duty. 554 F.2d at 1246. Reviewing the maritime standards that prevailed before the 1972 amendments, the Court concluded:

> "It is obvious, then, that the traditional, expansive maritime tort liability is not, despite appellant's contention to the contrary, to be judicially imported into Section 905(b) under the guise of 'non-delegable duty' or any other synonym for liability without fault." 554 F.2d at 1247

After it refused to impose liability on the vessel owner by applying pre-1972 maritime cases, the Third Circuit went on to consider the potential liability of the shipowner under various sections of the Restatement (Second) of Torts, specifically Sections 318, 416-429, and 414. Anayzing these sections, the Third Circuit concluded that application of any of them would result in imposing a type of non-delegable duty on the vessel owner; for this reason, the Court refused to apply any of them and affirmed the directed verdicts in favor of the vessel owner.

This discussion of *Hurst* indicates that, contrary to the Petitioner's assertions, the Third Circuit has scrupulously refused to impose a non-delegable duty of care on a shipowner. It has followed a course of deciding each maritime case coming before it on a case-by-case basis, as recommended by the legislative draftsmen of the 1972 amendments. See H. R. Rep. No. 1441, 92d Congress, 2 Sess. (1972), reprinted in U.S. Code Cong. Ad. News, pp. 4698, 4702-4(1972). This accounts for the line of cases that this Court has been asked by Petitioner to review. However, because of the definitive views expressed in *Hurst,* none of the decisions of the Third Circuit, either presently before this Court or having been decided earlier, have attempted to derogate from the decisions of this Court by creating a species of liability without fault, based on a theory of non-delegable duty, in maritime actions.

III. The Decision of the United States Court of Appeals for the Third Circuit in Griffith v. Wheeling-Pittsburgh Steel Corporation, Is Not In Conflict With the Decision of the Second Circuit in Albergo v. Hellenic Lines, Inc., No. 81-7006 (2d Cir. 1981).

Petitioner suggests in its brief that the decision of the Third Circuit in *Griffith* conflicts with a Second Circuit decision in *Albergo v. Hellenic Lines, Inc.,* (App. 253), and that this perceived conflict between two of the Courts of Appeals requires a corrective decision by this Court.

Even the most perfunctory reading of the *Albergo* and *Griffith* decisions demonstrates the lack of conflict between the opinions; indeed, the only point of factual similarity between the two cases would appear to be the presence of water as the accident situs; otherwise, the factual backdrops are so dissimilar that the two

cases have nothing else in common. Any conflict between these cases requiring resolution by this Court requires the most powerful of magnifying glasses to find.

In *Albergo,* a longshoreman tripped and fell over lashing rope that had been used to fasten together the cargo. As the cargo was unloaded from the ship, the rope would be removed and left on the ship's deck. It admittedly was the work of the stevedores to remove the rope. The appellant-longshoreman was fastening a preventer guy, and as he turned from this task, he fell over the loose rope. Previously, he had seen the rope and had moved it about in order to avoid tripping over it.

In contrast to *Albergo,* Thomas Griffith was a longshoreman assigned to work on a vessel whose covers were rusted, bent, damaged and difficult to open at the time the shipowner delivered the vessel to his employer, the nominal stevedore. Griffith could not avoid this condition, because the only work he or the other stevedores were to perform in loading the vessel required opening and then closing the covers. Only the vessel owner had the capacity to repair the structural deficiencies that existed in the vessel at the time of delivery; it was agreed that the vessel owner had repair facilities at its landing at Allenport, but that the nominal stevedore, Wheeling-Pittsburgh Steel Corporation, had no repair facilities to correct these conditions.

As a result of these factual differences, these are three significant features of the *Griffith* case that do not exist in *Albergo*: 1) *Griffith* involves structural deficiences in the vessel that existed at the time it was delivered to the stevedore; *Albergo* involves transient conditions that could not even be considered defects in the

vessel and that arose while the stevedore had possession of it. 2) The injured longshoreman in *Albergo* had the ability to make the vessel safe by merely moving the rope lashings to a different area; Thomas Griffith had no ability to remedy the structural defects in the covers that he was required to open and close in order to perform his work, and finally, 3) The stevedoring company in *Albergo* not only had the ability, but it was under a positive duty prescribed by law to clean up the rope lashings that constituted the "defect" in the vessel; in *Griffith,* because the vessel's deficiencies were structural and part of the operating and mechanical structure of the vessel, the only party with any ability to repair the defects in the vessel was the vessel owner —the stevedore lacked all of the necessary equipment needed to make the heavy repair to the barge.

There is no conflict between the decision of the Second Circuit in *Albergo* and the opinion of the Third Circuit in *Griffith.* Each opinion is a well-reasoned response to a different factual setting that requires no attempt by this Court to attempt to reconcile them. There is no conflict between the two opinions that requires this Court to issue a Writ of Certiorari.

CONCLUSION

A Writ of Certiorari should not be issued in this case. The opinion of the Third Circuit in *Griffith* is a well conceived and articulated response to a different set of facts than faced this Court in *Scindia,* and the opinion is in line with the common precepts that seem to be accepted by all members of this Court writing opinions in *Scindia.* The Third Circuit has not attempted to import a non-delegable duty into maritime law; instead, it has staunchly opposed any return to the legal theories that pre-existed the 1972 amendments. Comparing its opinions with those of the other Courts of Appeals, and particularly the Second Circuit, reveals no fundamental conflict in their decisions that merits review by this Court.

Respectfully submitted,
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Thomas W. Griffith

Opposition

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No. 81-826

In The

Supreme Court of the United States

October Term, 1981

AMERICAN COMMERCIAL LINES, INC.,
Petitioner,

vs.

THOMAS W. GRIFFITH and WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents.

OCEANIC NAVIGATION CORPORATION AND VLCC ANDROS ATLAS,
Petitioner,

vs.

LAWRENCE A. SARAUW,
Respondent.

SILVER BULK SHIPPING, LTD.,
Petitioner,

vs.

WILLIAM MC CARTHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT WILLIAM MC CARTHY IN OPPOSITION

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QUESTION PRESENTED

1. Where a longshoreman was injured as a result of an unsafe condition which was caused by the admitted negligence of the shipowner and the jury found that such condition could not have been remedied by reasonable stevedoring methods, was not the Court below correct in ruling that the judgment entered in favor of the longshoreman was not in conflict with this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. , 101 S.Ct. 1614, 61 L.Ed.2d 1 (1981)?

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NO. 81-826

IN THE

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OCTOBER TERM, 1981

AMERICAN COMMERCIAL LINES, INC.
Petitioner

v

THOMAS W. GRIFFITH and
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Respondents

OCEANIC NAVIGATION CORPORATION
AND VLCC ANDROS ATLAS
Petitioner

v

LAWRENCE A. SARAUW
Respondent

SILVER BULK SHIPPING, LTD.
Petitioner

v

WILLIAM MC CARTHY
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT WILLIAM MC CARTHY
IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondent, William McCarthy, respectfully prays that the petitioners' application for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered on October 20, 1981, be denied.

The Opinions and Orders of the Court Below, the Jurisdictional Requisites and the Statutes Involved are correctly set forth in the Petition.

STATEMENT OF THE CASE

The Statement of the Case as set forth in the Petition is inaccurate and incomplete both in its description of the circumstances under which respondent, McCarthy, was injured, and in its explanation of the proceedings in the District

Court. For this reason, and in order to set forth why the decision below is a correct application of this Court's decision in Scinida Steam Navigation Co. v. De Los Santos, 451 U.S. , 101 S.Ct. 1614, 61 L.Ed.2d 1 (1981), it is necessary to set forth a more complete factual history of the case.

Respondent, McCarthy, is a longshoreman. At all times relevant to this litigation, he was employed by Amstar Corporation in Philadelphia in connection with the discharging of a cargo of bulk sugar from the M/V "Silvertweed", a vessel owned and operated by petitioner, Silver Bulk Shipping, Ltd.

The discharge of a cargo of bulk sugar is accomplished by a three stage procedure. In the first stage, after the hatch covers of the vessel are opened, a crane with a large clam shell bucket

attached to it, digs down into the center of the stowed sugar, scooping out buckets full of sugar which are emptied into a gantry located on the pier. This digging out in the center of the stowed sugar results in the creation of a large inverted cone in the sugar which is deeper in the center and higher on the sides or wings of the hold.

In the second stage, bulldozers are lowered into the hold which pull the sugar from the sides or wings of the hold toward the center, filling up the inverted cone and leveling off the stow.

In the third, stage, longshoremen, referred to as "cleaners" or "trimmers", go into the hold and, using scrapers, knock down any sugar that may have remained stuck to the ribs or other

structural members of the ship.*

After the cleaners finish their work, the cycle is repeated as many times as may be necessary to complete the removal of all the sugar from the hold. Respondent, McCarthy, was one of the cleaners employed by Amstar in this discharging operation.

In the Petition the statement is made that this discharging procedure was "established by Amstar and without any consultation with or participation by vessel personnel" (Petition, p. 20). This statement is only partially true, and being only partially true, it is misleading. The evidence was that this procedure for

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* The scrapers are similar to the blades used on ice choppers. The cleaners use two scrapers -- a short scraper which has a handle 6 feet long, and a long scraper which has a handle 10 to 12 feet long.

discharging bulk sugar was "common in the industry" (see District Court Opinion, reproduced in the Appendix to the Petition at page 174, and citations to original transcript of trial testimony set forth therein). While Amstar made its own decision to use this procedure, the shipowner knew at the time the cargo was loaded that this procedure would be used to discharge the sugar.

Similarily, the statement in the Petition (at page 20) that the collective bargaining agreement governing McCarthy's employment precluded participation by vessel personnel in the discharging operation also is misleading for there is nothing in the collective bargaining agreement, nor any evidence of any maritime practice, which would preclude the ship's crew from going into a hold, even during cargo operations, to correct any

unsafe condition that might exist in the ship's equipment or cargo.

The M/V "Silvertweed" arrived at the Amstar pier in Philadelphia on December 24, 1976. The cargo discharging operation began on December 27, 1976. When the No. 1 hatch of the vessel was opened, it was discovered that some of the cargo in the hold had been damaged by water. At that point, both the shipowner's representatives and Amstar were made aware of this condition, and each called in surveyors to appraise the damage to the sugar cargo and to determine the cause thereof.

The surveyors tested the water in the hatch for salt content and determined that it was sea water. They then examined the hatch covers of the No. 1 hatch. Their examinations determined that the hatch covers were heavily rusted with the result that they did not create a watertight seal

for the hatch, and that, as a result of this condition, sea water had been able to enter the hold during the course of the ocean voyage. There subsequently was testimony at trial that the extent of the rust was such that it took years to develop and that the maintenance of the hatch covers was the duty of the ship's crew (Appendix, pp. 168-169). As a result of this testimony, which was uncontradicted, the shipowner subsequently admitted at trial that it had been negligent in failing to properly maintain the hatch covers (Appendix, p. 169).

After completion of the surveys, Amstar commenced the discharging operation using the customary method of discharging

bulk sugar ships described above.* During the first discharging cycle, respondent, McCarthy, encountered some sugar that was frozen to the ribs of the hold. He described this frozen sugar as being grayish, evidencing the presence of water, and testified that it was frozen solid, like cement. He tried to dislodge it by using his short scraper but was unable to do so. There being no possible way to remove the frozen sugar, it was just left where it was, frozen to the ribs of the ship.

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* The longshoremen were paid distress rates for discharging the wet sugar because its wet condition made it syrupy and created a "noxious" condition in which to work. Contrary to the statement made at page 22 of the Petition, the payment of the distress rates had nothing whatsoever to do with the removal of any sugar that was found to be frozen nor was it a special payment for working under dangerous working conditions.

The discharging operation proceeded through a second and third cycle, and a couple of days later, respondent entered the hold to do the scraping at the conclusion of the third cycle. By this time, the frozen sugar which he had encountered during the first cycle was 30 feet above his head and well beyond his reach. He had just entered the hold, and was picking up his tools to walk over to the area where he was supposed to work, when a block of frozen sugar, described as being approximately four feet in length, a foot wide and a foot or so thick, fell from the ship's ribs above where he was working, striking him on the head and rendering him unconscious.*

---

* In the Petition, the statement is made that respondent was struck by a block of "caked" sugar (Petition,p.24). This is a gross misstatement of the evidence. The testimony was that respondent was struck by a block of "frozen" sugar. There was no mention of "caked" sugar.

At trial, the shipowner, while admitting its negligence in failing to properly maintain the hatch covers, contended that the proximate cause of the accident was the failure of Amstar to use proper methods to remove the frozen sugar when it was first encountered.* With respect to this defense, it was the view of the trial judge that if an unsafe condition which caused injury to a longshoreman were such that it could have been

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* The shipowner contended at trial that the frozen sugar could have been removed if other tools, such as a pick or sledge hammer had been utilized. Respondent's witnesses testified that these types of tools were no better than a short scraper for this type of operation and that any sugar that could be removed by a pick or sledge hammer could also be removed by a short scraper. The jury's verdict resolved this issue in respondent's favor.

remedied by his stevedore employer using reasonable stevedoring methods, then the stevedore was under a duty to do so, and, in such event, the shipowner would be relieved from liability even if the shipowner had been negligent in creating the condition. As will be discussed subsequently in this brief, this interpretation of the law was more favorable to the shipowner than that subsequently adopted by this Court in Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. , 101 S.Ct. 1614, 68 L.Ed. 2d 1 (1981). However, as a direct consequence of this view of the law, the trial judge ruled that it was not necessary for the shipowner to establish that the stevedore was "negligent" in failing to remedy an unsafe condition; rather, the shipowner needed to establish only that the condition was one that could have been

remedied by a reasonable stevedore.

As applied to the facts of the instant case, since the shipowner had admitted its negligence in failing to properly maintain the hatch covers, the only issues with respect to liability were (1) whether the shipowner's admitted negligence was a proximate cause of respondent's injuries, and (2) whether the unsafe condition which caused the respondent's injuries was one which could have been remedied by reasonable stevedoring methods. Therefore, in submitting the case to the jury, the trial judge did not charge the jury on the standard of care, but rather submitted two factual Interrogatories to the jury on the basis of which he would mold a verdict. The two Interrogatories submitted to the jury were as follows:

"1. Did the leakage of seawater into the hold alone or in combination with the freezing temperature bring about a condition which was a substantial factor in causing the accident?

Yes_____ No_____

2. If your answer to #1, is YES, was this a condition which could have been remedied by a reasonable stevedore?

Yes_____ No_____"

In submitting these Interrogatories to the jury, the trial judge advised counsel that if the jury were to answer Interrogatory No. 1 "Yes", and Interrogatory No. 2 "No", he would mold a verdict in favor of the plaintiff, but if the jury answered Interrogatory No. 2, "Yes", then he would mold a verdict in favor of the defendant shipowner even if the answer to Interrogatory No. 1 was "Yes."

The jury answered Interrogatory No. 1 "Yes" and Interrogatory No. 2 "No", and,

on the basis of these answers, judgement was entered in favor of respondent.

The judgment of the District Court was affirmed by the Court of Appeals for the Third Circuit by judgment order dated December 12, 1980. This judgment was vacated by Order of this Court dated May 4, 1981, remanding the case to the Court of Appeals for the Third Circuit for further consideration in light of the decision in Scindia Steam Navigation Co. v. De Los Santos, supra (Appendix, p.37). On remand, the Third Circuit, after re-examining the record, reinstated the original verdict noting that "In the case at bar, the jury found that the dangerous condition caused by the negligence of the shipowner could not have been remedied by a reasonable stevedore" (Appendix, p. 16) (Emphasis supplied).

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE THIRD CIRCUIT CORRECTLY APPLIED THE PRINCIPLES ANNOUNCED BY THIS COURT IN SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS, 451 U.S. , 101 S.Ct. 1614, 69 L.Ed.2d 1 (1981) TO THE FACTS OF THE INSTANT CASE.

Throughout the Petition, petitioners repeatedly accuse the Third Circuit of blatantly disregarding this Court's decision in Scindia Steam Navigation Co. v. De Los Santos, of refusing to apply the Scindia standard, and even of acting "temerariously" in finding that Scindia supported the standard applied by the Third Circuit in the Griffith decision (Petition, p. 36). Yet, nowhere in the Petition do the petitioners define the Scindia standard or set forth in what respects the decision in the instant case is in conflict with Scindia. Indeed, petitioners totally ignore the fact that in the instant case the jury's role was

limited to making factual determinations on the basis of which the trial judge molded a verdict. Since the shipowner had admitted its negligence, the jury was not instructed on the standard of care, and the sufficiency of the evidence to support the jury's answers to the factual interrogatories was neither challenged on appeal or affected by the Scindia decision. The issue before the Third Circuit on remand simply was the application of the Scindia decision to these factual determinations.

Petitioners' argument seems to be that the Third Circuit's standard in Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3rd Cir. 1979), was similar to the Ninth Circuit's standard in Scindia, that the Ninth Circuit's standard was rejected by this Court in Scindia, and that, therefore, all the

prior decisions of the Third Circuit necessarily were incorrect. The truth of the matter is that the Ninth Circuit's standard was not rejected completely by this Court in Scindia,* and, more important, the particular application of the standard which was rejected in Scindia never was adopted by the Third Circuit in Griffith or any other case.

Prior to the decision in Scindia, both the Third Circuit and the Ninth Circuit articulated a general expression of the standard of care as being "reasonable care under the circumstances." This Court, in Scindia, specifically noted that it was not rejecting this general statement of the standard of care, but indicated

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* The Ninth Circuit's denial of the motion for summary judgment in Scindia, reversing the District Court's granting of summary judgment, actually was affirmed by this Court, not reversed.

that it would have to "undergo refinement" as applied in various categories of cases. Thus, this Court stated, at footnote 10 to the Scindia Opinion, referring to the expression of the standard of care as being reasonable care under the circumstances (68 L.Ed.2d at 10):

> "We have no quarrel with this standard. Inevitably, however, the rule will undergo refinement as it is applied to various categories of cases."

One of the refinements announced by this Court in Scindia was the holding that "absent contract provision, positive law or custom to the contrary," the shipowner did not have a continuing duty of inspection "to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore",see 68 L.Ed.2d at 15.

This aspect of the Scindia decision has no application whatsoever to the instant

case. Here the defective condition which lead to respondent's injury was the rusted condition of the hatch covers, a condition which existed long prior to the commencement of cargo operations, which took years to develop, and was the result of the admitted negligence of the ship's crew (Appendix, p. 169).

Proof of negligence as a basis for tort liability depends upon what knowledge is to be attributed to the defendant. A defendant's conduct is judged on the basis of those facts and circumstances of which (1) he either knows or (2) has reason to know, see Restatement of Torts, 2d, §289. In the trial of a case, proof of a defendant's knowledge of a defective condition may be established in one of three ways:

First, by proof of direct complaint to the defendant about the condition.

Second, and very important to the instant case, by proof that the condition was created as a result of the defendant's own negligence.*

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* A defendant is always deemed to have knowledge of his own negligent acts and of the consequences thereof. See, e.g., Schwartz v. Warwick-Philadelphia Corp., 424 Pa. 185, 191 (1967), Hayden v. Philadelphia, 381 Pa. 134, 138 (1954), Clark v. Glosser Bros.Dept. Stores, Inc., 156 Pa. Superior 193 (1944), Sleek v. J. C. Penney Co., 208 F.Supp. 207, 209 (W.D. Pa. 1962).

In Clark v. Glosser Bros. Dept. Stores, Inc. supra, the Court explained this principle as follows, 156 Pa. Superior at 195-196:

> "The defendant denies liability asserting that there was no proof of constructive notice of the alleged dangerous condition of the floor. That was unnecessary. Plaintiff's proof, which must be accepted on this appeal, shows that the injuries sustained by her were due to the direct negligence of the defendant's employes in throwing the tapes in the aisles or not taking reasonable precuation to prevent their falling to the floor, so that the question of constructive notice

(Footnote continued next page)

Third, by proof that the condition was one that could have been discovered by a reasonable inspection where the circumstances were such that the defendant was under a duty to make such an inspection.

Section III of the Scindia decision discusses only this third method of proof and the scope of the shipowner's duty of inspection as it relates thereto. This Court held that the shipowner had no continuing duty to inspect the stevedore's operations to discover any conditions which might develop within the confines of those operations. However, Scindia

(Footnote continued)

"was not of vital importance. The defendant's employes had actual notice of their own alleged acts, which were within the apparent scope of their authority and in the furtherance of the master's business. The defendant is accordingly chargeable with their dereliction. Kelly et ux v. Yount, 135 Pa. Superior Ct., 528,533, 7 A.2d 582." (Emphasis supplied)

certainly did not preclude proof of a defendant's knowledge through the vehicle of direct complaint or by proof that the condition was the result of the shipowner's own negligence. In the instant case, the defendant's knowledge of the defective condition of the hatch covers was proven by the testimony that the rusted condition would have taken years to develop and that the maintenance of the condition of the hatch covers was the duty of the ships' crew. The shipowner admitted its negligence in this regard, and, therefore, there was no issue presented by the instant case with respect to proof of the shipowner's knowledge of the defective condition or with respect to the shipowner's responsibility for the existence of the defective condition.

Since the shipowner in the instant case admitted its negligence, the trial judge clearly was correct in viewing the

the principle issue as being whether this admitted negligence was a proximate cause of plaintiff's injury. The Scindia decision does not deal with the question of proximate cause and no error was asserted by the shipowner with respect to the trial court's charge on proximate cause or the validity of the jury's finding that the shipowner's negligence was a proximate cause of respondent's injuries. Thus, there is nothing in Section III of the Scindia decision which would require reversal of the decision below or the resubmission of the case to the jury.

Despite its admitted negligence in the maintenance of the hatch covers, the shipowner, in the Court below, argued that under Scindia, it should not be held liable because there was no evidence that it knew of the presence of the particular block of frozen sugar that fell and struck

respondent. In so arguing, the shipowner continually ignored the point that the negligence being alleged was not that the shipowner should have removed the block of frozen sugar, but rather that the shipowner was negligent in the maintenance of the hatch covers, and that it was this negligence which caused the frozen block of sugar to come into existence.

Proof of causation between a negligent act and a subsequent injury does not require evidence that the tort feasor either foresaw or should have foreseen the precise manner in which the injury occurred. This principle is set forth in §435(1) of the Restatement of Torts, 2d, as follows:

> "§435. Foreseeability of Harm or Manner of Its Occurrence
>
> (1) If the actor's conduct is a substantial factor in bringing

> "about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable. (Emphasis supplied)

Under the principle set forth in §435(1), there was no need for respondent to show that the shipowner knew of the presence of the particular frozen block of sugar which fell and hit him; rather, respondent needed only to show that the shipowner's negligence in the maintenance of the hatch covers was a substantial factor in bringing about the condition which caused his injury. This was the precise issue that the trial judge submitted to the jury in Interrogatory No. 1. It would be a strange principle of law that would permit a defendant to be exonerated from the consequences of admittedly negligent conduct because the plaintiff failed to prove, in addition, that the defendant also

was negligent in failing to correct the condition which the defendant's negligence had created. Having established that the shipowner was negligent in creating a dangerous condition, it was not incumbent upon the respondent to establish that the shipowner also was negligent in failing to remedy that condition, particularly when, as in the instant case, there was no reasonable means by which the condition could be remedied.

The second refinement to the "reasonable care under the circumstances" standard announced by this Court in Scindia was that the shipowner might be relieved from liability for a defective condition of which it had knowledge if the circumstances were such that the shipowner might be justified in relying upon the stevedore to protect the longshoremen from injury. This Court noted that a

relevant consideration in determining whether the shipowner had breached its duty of reasonable care was the extent to which the shipowner might be entitled to rely on the stevedore's performing those duties imposed on it "under the positive law," see 68 L.Ed.2d at 18.

This Court, in Scindia, indicated that the issue of whether a shipowner might be justified in relying on the stevedore to protect the longshoremen was a factual issue to be presented to the jury for its determination. In the instant case, however, the trial judge went even further than this requirement and ruled as a matter of law that if a dangerous condition could be remedied by the stevedore, then the shipowner would be relieved from liability without regard to whether the shipowner was entitled to rely on the stevedore taking corrective

action. Under the trial judge's rulings it did not matter whether the shipowner would be justified in relying on the stevedore to correct the dangerous condition or even if the stevedore was or was not negligent in failing to correct the condition. The issue solely was one of the ability of the stevedore to correct the condition. This standard of liability obviously is more strict, and more favorable to the shipowner, than that required by this Court's decision in Scindia.

In the Petition (pp. 52-53), petitioners berate the Third Circuit and the trial judge for refusing to admit into evidence an OSHA regulation which petitioners would have the Court believe was relevant to the issue of the stevedore's negligence.* However, in ruling that

* The offered OSHA regulation, 29 C.F.R. §1918.83 is rather meaningless in the context of a bulk sugar discharging

(Footnote continued on next page)

evidence of the stevedore's negligence was not relevant to the issues being submitted to the jury, the trial judge was not ruling against the shipowner but

(Footnote continued)

operation. It states as follows:

"§1918.83. Stowed cargo, tiering and breaking down.

(a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.

(b) In breaking down, precautions shall be taken when necessary, to prevent the remaining cargo from falling.

(c) . . . "

Precisely how a cargo of bulk sugar, or even a frozen portion thereof, could be "secured or blocked to prevent its shifting or falling" is not readily apparent and the shipowner offered no testimony as to what Amstar should have done to prevent it from falling. On the contrary, at trial the shipowner's contention was that Amstar was derelict in failing to remove the sugar, not in failing to secure it in place.

rather was ruling in favor of the shipowner, for coupled with this ruling was the trial judge's ruling as a matter of law that the stevedore had a duty to remedy any unsafe condition which could be remedied by reasonable stevedoring methods. This Court's decision in Scindia does not require that OSHA regulations be submitted to the jury in every case. Rather, this Court stated, "The trial court and where appropriate, the jury should be made aware of the scope of the stevedore's duty under the positive law," 69 L.Ed.2d at 18 (Emphasis supplied). This is precisely what was done here. The trial court was made aware of the regulation. It was not appropriate to submit the regulation to the jury because the jury was deciding only the factual issue of whether the condition could be remedied by a reasonable stevedore. The legal duty of the

stevedore to remedy an unsafe condition if it was able to do so was decided as a matter of law by the trial judge in the shipowner's favor.

The jury found in response to a specific factual Interrogatory that the dangerous condition which was proximately caused by the shipowner's negligence could not have been remedied by reasonable stevedoring methods. If the dangerous condition could not have been remedied by the use of reasonable stevedoring methods, then the shipowner cannot complain that it should be relieved from liability because it was relying on the stevedore to correct something which was beyond the ability of the stevedore to correct. Therefore, the holding of the Third Circuit in its decision on remand, that the instant decision was not contrary

to the rulings announced by this Court in Scindia clearly was correct.*

In the instant case, the jury was not instructed on the standard of care, as the shipower had admitted its negligence in the faulty maintenance of the hatch covers. Rather, the jury was asked to decide two

---

* Petitioners appear to be arguing that once a stevedore knows of an unsafe condition, even one created by the shipowner's negligence, the shipowner should be relieved from liability even if the condition is beyond the ability of a reasonable stevedore to remedy. Under this argument, a tort feasor who negligently created a dangerous condition would be entitled to claim immunity from liability on the grounds that there was no cure for the condition which its negligence had created. There is no legal authority which supports the existence of so illogical a defense. Indeed, such a defense would totally undermine the Congressional objective in preserving the longshoreman's negligence remedy for it would eliminate all incentive on the shipowner to avoid the creation of unsafe conditions.

factual issues on the basis of which the trial judge molded a verdict. There is no suggestion in the Petition, nor was any issue raised on appeal, that there was not an adequate factual basis in the testimony to support these findings by the jury. Therefore, it was not necessary for the Third Circuit, on remand, to itself remand the case to the District Court for retrial; rather, it needed only to apply these factual findings by the jury to the standard set forth in the Scindia decision. As noted above, these factual findings of (1) admitted negligence in the creation of a defective condition, (2) proximate cause between the negligent condition and the injuries suffered by the plaintiff, and (3) that the condition was one that could not have been remedied by a reasonable stevedore, dictated a judgment in favor of the longshoreman under the principles announced by this Court in its decision

in Scindia. Accordingly, it cannot be said that the Third Circuit refused to follow the Scindia decision in the instant case; on the contrary, the Third Circuit dutifully followed and applied the Scindia decision, and its decision reinstating the verdict in this case clearly was correct.

II. THE THIRD CIRCUIT'S DECISION IN THE INSTANT CASE IS NOT IN CONFLICT WITH THE DECISION OF THE SECOND CIRCUIT IN ALBERGO V. HELLENIC LINES, INC., NO. 81-7006 (2nd Cir.Aug. 21, 1981).

In an effort to establish a conflict in Circuits, petitioners contend that the decision below is in conflict with the decision of the Second Circuit in Albergo v. Hellenic Lines, Inc., No. 81-7006 (2nd Cir. Aug. 21, 1981). However, even the most cursory reading of the Albergo decision discloses significant factual distinctions between it and the instant case which not only belie the existence of the

claimed conflict in Circuits, but dramatically illustrate the correctness of the decision below.

Albergo involved a factual situation in which a longshoreman tripped over lines which had been left on the deck of the vessel by the ship's crew. The presence of these lines created an obvious hazard which the longshoreman could have very easily remedied simply by moving them out of the way. The ease with which the longshoreman could have removed the lines and, therefore, remedied the unsafe condition was emphasized by the Second Circuit as follows:

> "With the duty on the plaintiff's employer it would be contradictory to suggest that loose debris of the sort here involved, so easily removable as it was here, by hand, can establish liability for negligence on the part of the vessel owner." (Appendix, pp. 262-263) (Emphasis supplied)

In the instant case, the trial judge specifically recognized that if the condition which caused the respondent's injuries was one which could have been remedied by reasonable stevedoring methods, then the shipowner would not be liable. This is precisely the same rule that was applied by the Second Circuit in Albergo. However, in the instant case, the jury found that the condition was not one that could have been remedied by a reasonable stevedore, and it was on the basis of this finding that the trial judge molded a verdict in favor of the respondent. Certainly there is nothing in Albergo which even remotely suggests that a shipowner would not be liable where its negligence creates a condition which can not be remedied by reasonable stevedoring methods.

There is no conflict in the application of the Scindia decision between the Second Circuit and the Third Circuit. Rather, both Circuits are correctly applying the Scindia decision to the particular factual circumstances presented by the cases before them.

CONCLUSION

For all the reasons set forth herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES SOVEL
FREEDMAN AND LORRY,P.C.
Attorneys for Respondent
William McCarthy

Opposition

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Office - Supreme Court, U.S.
FILED
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No. 81-826

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

AMERICAN COMMERCIAL LINES, INC.,
Petitioner

v.

THOMAS W. GRIFFITH and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondents

OCEANIC NAVIGATION CORPORATION
and VLCC ANDROS ATLAS,
Petitioners

v.

LAWRENCE A. SARAUW,
Respondent

SILVER BULK SHIPPING, LTD.,
Petitioner

v.

WILLIAM MCCARTHY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SARAUW'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. The Judgment of the Court of Appeals was entered after consideration of *Scindia* and is in all respects consistent.

2. The legal issue as to whether a duty of due care is owed by a shipowner to a longshoreman in 33 U. S. C. §905 (b) negligence actions was resolved in *Scindia*, and does not affect a Jury's finding of fact that a shipowner breached a duty of due care and was the actual and proximate cause of the longshoreman's injuries.

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No. 81-826

IN THE
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SARAUW'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

According to R. S. Ct. 21 (g) the shipowner is required to include a concise statement of the case containing the facts material to the consideration of the questions presented. Because the shipowner's statement of the case is inaccurate and omits material facts, Sarauw deems the following counter statement of the case necessary to correct such inaccuracies and omissions.

On November 15, 1977 at approximately 2:30 a.m., Sarauw was seriously injured when the gangway fell off the VLCC Andros Atlas. Sarauw was employed as a dock helper for Hess Oil Virgin Islands Corporation and was changing from a small to a large gangway. The change was necessitated by the rise of the ship which was discharging crude oil. Sarauw, operating a crane, was about to place the large gangway upon the ship when he observed a chain blocking the location on the ship where the gangway was to be placed. He called out to the ship's crew for assistance but received no response. Sarauw descended the large gangway walked a short distance across the dock and ascended the small gangway to seek assistance. As he ascended part way up the small gangway, it suddenly came off the ship and crashed to the dock. The unsecured condition of the gangway was not denied.

Viewing the evidence and the inferences to be drawn therefrom in the light most favorable to Sarauw, the jury may have found that the gangway was never secured to the ship. The ship-owner's numerous allusions to the gangway having been initially secured to the ship upon docking is not supported by the preponderance of the evidence. Such allusions are derived solely from the testimony of the ship's captain whose credibility the jury was entitled to discredit. Neither Sarauw, the ship's second officer or any person in a position to see, saw the gangway secured with rope or chain. The shipowner's

view of the evidence and the inferences it draws therefrom prevent a ready and adequate understanding of the points requiring consideration. To describe the evidence relevant to any initial securing of the gangway as uncontradicted and to assert that rope and chain were later removed is misleading. A more accurate description would ignore the ship's captain's testimony and assert the preponderance of evidence was that the gangway had never been secured with rope or chains.

Furthermore, the shipowner's statement that Sarauw was going aboard to remove the ship's railing and that he denied removing any rope or chain securing the gangway is not supported by the evidence. Sarauw testified that he was going aboard to seek assistance and was never asked whether he had personally removed any rope or chain securing the gangway. These statements attributed to Sarauw are false. Indeed, removal of rope and chain from the gangway by Sarauw was never an issue at trial and to first raise such an issue by innuendo before this Court constitutes misconduct.

ARGUMENT

I. The Judgment of the Third Circuit in *Sarauw* was considered in Light of *Scindia* and is Entirely Consistent Therewith

The shipowners contention that the Third Circuit defied the mandate of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U. S. , 101 S. Ct. 1614 (1981) by ignoring and refusing to apply the newly formulated standard of care is inaccurate and contrary to the spirit of *Scindia*. In the Opinion and Concurring Opinion, at pages 24 and 30 of Petitioner's Appendix, the Third Circuit acknowledged *Scindia* as the source of it's rationale:

> ". . . We, accordingly, proceed to address the liability issues presented by Oceanic's appeal in the light of the ruling of the Supreme Court in *Scindia*."

> "I agree that our previous judgment in this case should be reinstated, but I write separately to illustrate why, in my view, the reasoning in the prior opinion is consistent with *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, . . ."

In approving the standard of conduct of reasonable care under the circumstances, this Court recognized that the facts of each case would be important in evaluating the proper instructions. This Court said in *Scindia* in footnote 10 at page 6:

> "We have no quarrel with this standard. Inevitably, however, the rule will undergo refinement as it is applied to various categories of cases. Thus, in considering the reasonableness of Scindia's conduct under this standard, the Court of Appeals found it appropriate to inquire whether the shipowner had a continuing duty to inspect and held that it did. As will become evident, we have a different view; The shipowner's duty of reasonable care under the circumstances does not impose a continuing duty to inspect the cargo operations once the stevedore begins it's work."

Thus, the Third Circuit's holding that a gangway supplied by the stevedore and used for ingress and egress by all persons having business aboard was outside the confines of the cargo operations and within the "active control" and "positive custom" exceptions is entirely consistent with *Scindia*.

A requirement that the shipowner insure that such a gangway is safely secured at all times does not violate *Scindia* by imposing a non-delagable duty upon the shipowner. The Third Circuit's Concurring Opinion dated July 31, 1981, at pages 30 and 31 of Petitioner's Appendix explained:

> "The case does not proclaim that a vessel may never be found negligent in connection with mis-

haps suffered by longshoremen. The Supreme Court crafted at least two exceptions to the freshly promulgated policy against holding the shipowner responsible. First, the Court noted that it is ' "accepted that the vessel may be liable . . . if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas or from equipment under the active control of the vessel during the stevedoring operation . . ." ' Second, the Court indicated that in some circumstances ' "positive law or custom" ' may impose on the shipowner ' "a duty of supervisory inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations . . ." '

"Both of these principles are directly applicable to the case at hand. In our initial opinion we held that the shipowner maintained control over the manner in which the gangway was to be secured . . . Relying on testimony by the plaintiff's expert, which was corroborated by the ship's captain and the second officer, we also affirmed the trial court's finding that the evidence established a duty on the part of the shipowner to secure, maintain, and watch over the gangway . . . The source of this duty is the custom of ' "good seamanship" ' and the tradition of maritime law."

The other non conformity was discussed in the Opinion dated July 31, 1981, at page 25 of the Petitioner's Appendix as follows:

"The precise question which this case presents on remand is whether the gangway here involved which was supplied by the stevedore and used by the longshoremen was an appliance which was ' "within the confines of the cargo operations" ' assigned to the stevedore within the meaning of the

rule laid down in the *Scindia* case and, therefore, outside the general duty of the shipowner to use reasonable care to inspect and supervise for the purpose of discovering and remedying dangerous conditions which might exist or develop in the course of its use. We do not think that the gangway in this case falls into that category."

The shipowners argument that the abolition of indemnity from stevedores coupled with U.S.C. Section 905 (b) negligence actions puts it in a worse position than prior to the 1972 amendment and destroys the stevedores incentive to protect the safety of its workers is unfounded. Under the 1972 Amendments, the longshoremans right to recover for unseaworthiness was abolished and the shipowner's liability for injury to longshoremen was limited to section 905 (b) negligence actions. Furthermore, the cost of providing substantially increased compensation payments to injured longshoreman is ample incentive to encourage stevedores to ensure their safety.

Of the four post *Scindia* cases cited by the shipowner in support of its position, two were decided without definitive opinions and two are distinguishable. *Futo v. Lykes Bros. Steamship Co., Inc.*, (5th Cir. filed July 21, 1981) and *Bachtel v. Mammoth Bulk Carriers, Ltd.*, (9th Cir. filed 1981) at pages 249 and 251 of the Petitioner's Appendix remanded those cases to the District Court without an opinion explaining the rationale for their actions. *Harris v. Reederei*, (4th Cir. filed August 11, 1981) at page 240 a petitioners appendix involves longshoremen injured by a defective winch within the confines of the cargo operation and *Albergo v. Hellenic Lines, Inc.* (2nd Cir. filed August 21, 1981) at page 253 of petitioners appendix involved loose lashing rope on the deck within the confines of the cargo operation. Both of these cases are factually distinguishable from Sarauw, since the unsecured condition of the gangway was outside the confines of the cargo operation.

II. In *Sarauw*, the Third Circuit Applied the Duty of Due Care Prescribed by *Scindia* and Approved of the Trial Judge's Instructions on the Standard of Conduct

The shipowner's assertion that the Third Circuit failed to cite authority to support the proposition that the gangway was outside the confines of the cargo operation is unfounded. In the Opinion filed July 31, 1981, at pages 25, 26, 27, and 28 of Petitioner's Appendix, the Third Circuit devoted two lengthy paragraphs to such proposition and cited *The Admiral Peoples*, 295 U.S. 649 (1935) and *Romero Reyes v. Marine Enterprises, Inc.*, 494 F.2d 866, 870 (1st Cir. 1974). The essence of the discussion was as follows:

> "Accordingly, here the gangway supplied by the stevedore became the vessel's gangway in the sense that it was the only gangway available to the vessel. It was, therefore, necessarily used for embarking and disembarking by the officers and crew of the vessel and any others having business on her as well as by the longshoremen. It thus became, when put in place, a basic appurtenance of the vessel, its means of access to the land.

No conflict exists between the Third Circuit's imposition of duty of due care upon the shipowner to insure that the gangway is safely secured at all times and 29 C. F. R. §1918. 11. Although the gangway in *Sarauw*, was supplied by the stevedore and used for ingress and egress by all persons having business aboard, the Third Circuit recognized that a case might arise where a gangway was within the confines of the cargo operations. The Third Circuit said in the Opinion dated July 31, 1981 at page 26 of Petitioner's Appendix:

> "Conceivably, there might be a case in which a special gangway, which is in addition to the ship's regular gangway is supplied by a stevedore for the

exclusive use of its longshoremen in carrying out its cargo operation and which therefore, might be regarded as wholly within the confines of that operation under the *Scindia* rule. But this is clearly not such a case."

The instructions to the jury caused no prejudice to the shipowners. Negligence is defined as an act or omission which breaches a duty of due care and is the actual and proximate cause of plaintiff's injuries. Sarauw's complaint against the shipowner was filed pursuant to §905 (b) and was an action for negligence. The Trial Judge determined that the shipowner owed a duty of due care to Sarauw and allowed the jury to determine whether the shipowner breached that duty of due care. The instructions on the standard of conduct were derived from the RESTATEMENT (SECOND) OF TORTS §343 and 343A as follows:

> "A vessel owner is subject to liability for physical harm caused to his invitees caused by a condition on the vessel if, but only if, the vessel owner knows or by exercise of reasonable care would discover the condition and would realize it embodies an unreasonable risk of harm to the invitees and should expect that the invitee will not discover or realize the danger or will fail to protect himself against it, and the vessel owner fails to exercise reasonable care to protect against the danger, to protect that invitee against that danger.
>
> A vessel owner is not liable to its invitees for physical harm caused to the invitee by any condition of the vessel whose danger is known or is obvious to the invitee unless the owner should have anticipated the harm despite such knowledge or obviousness of the danger."

The wording of the instruction derived from §343A is almost identical to the wording of the Third Circuit's

standard of conduct known as ordinary care under the circumstances and which was approved in *Scindia*. This Court said in footnote 10 at page 6:

> "10 . . . The Court of Appeals referred to its standard as being a "reasonable care under the circumstances approach" . . . It found support for this formulation in *Kermarec* . . . The *Kermarec* standard was reaffirmed in *Marine Terminals* . . . We have no quarrel with this standard."

The functions of the judge and jury with respect to the duty of due care and breach of the duty of due care are hornbook law. A familiar example is found in W. PROSSER, LAW OF TORTS 206 and 207 (4th ed 1971) as follows:

> 3. The existence of a duty. In other words, whether upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other — or more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. This is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court.
>
> 5. The particular standard of conduct . . . The question here is what the reasonable man would have done under the circumstances. Under our system of procedure, this question is to be determined in all doubtful cases by the jury, because the public insists that its conduct be judged in part by the man in the street rather than by lawyers, and the jury serves as a shock-absorber to cushion the impact of the law.

The shipowner fails to recognize the fundamental distinction between the duty of due care or standard of

care as determined by the trial judge and the standard of conduct used by the jury to determine whether the defendant breached the duty of due care or standard of care. The shipowner confuses the terms standard of conduct and standard of care. The standard of care is synonymous with duty of due care whereas the standard of conduct is used to determine whether the defendant has breached the duty of due care or standard of care.

Of course, the Third Circuit recognized the distinction and for that reason has twice approved of the instructions in *Sarauw* on the standard of conduct. This instruction derived from §343 is merely a codification of the well recognized standard of conduct for determining whether a defendant has breached a duty of due care and is not affected by the duty of due care or standard of care prescribed in *Scindia*. Furthermore, the instruction based on §343A, was error in favor of the shipowner, since the land based concepts of contributory negligence and assumption of the risk were disapproved in *Scindia*. In the Opinion dated July 31, 1981 at pages 22 and 29 of Petitioner's Appendix, the Third Circuit said:

> "In the present case there was evidence from which the jury could find, as it did, that Oceanic failed in its duty of exercising due care to discover and correct the unsafe condition of the gangway which, obviously, became more and more critical as the vessel rose in the water during unloading. We remain satisfied, as we were when the case was here before, that the instructions fairly presented this issue to the jury. . .
>
> . . .we held that any error in applying to Oceanic the duty of care set forth in those sections of the Restatement benefited Oceanic and was not grounds for reversal."

Even though the shipowner's arguments relative to non-delegable duty and Congressional intent have already been dispelled, it should be pointed out that it is an

exaggeration to state that the Third Circuit requires a constant watchman at the gangway. The well recognized standard of conduct was set forth in the Opinion and Concurring Opinion dated July 31, 1981 at page 27 and 32 of Petitioner's Appendix:

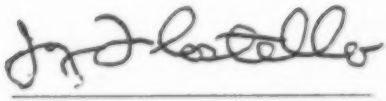
> "It thus became, when put in place a basic appurtenance of the vessel, its means of access to the land. . .We are, accordingly, satisfied that *Scindia* does not require us to depart from our original conclusion, which we affirm, that Oceanic had the duty to exercise reasonable care with respect to the gangway's being properly secured to the vessel and maintained in safe condition for use."
>
> "The vessel owner did not exercise due care with regard to the gangway area, which remained under the vessel's active control . . . and the custom of admiralty dictates that the shipowner had a continuing duty to watch over and inform itself about hazards involving the gangway and the manner in which it was fastened to the ship . . ."

III. The Shipowner Failed to Accurately Present a Ready and Adequate Understanding of the Points Requiring Consideration

According to R. S. Ct. 21 (5) a petition for certiorari must accurately present a ready and adequate understanding of the points requiring consideration. The shipowner's statement of the case containing inaccurate references to the testimony of Sarauw and omitting references to contradictory testimony of Sarauw and the second officer was false and misleading. Such misconduct required Sarauw to request certification of and transmittal of the Transcript of Testimony to this Court as shown by Sarauw's Appendix.

CONCLUSION

Sarauw requests that the Petition for a Writ of Certiorari be denied.



November 27, 1981

Joseph L. Costello
Counsel for Sarauw

APPENDIX

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

LAWRENCE A. SARAUW	)	Civil No.
Plaintiff	)	1978/57
v.	)	
OCEANIC NAVIGATION	)	Action in
CORPORATION	)	Admiralty
and VLCC ANDROS ATLAS,	)	for Damages
Defendants	)	

REQUEST FOR CERTIFICATION AND TRANSMITTAL

Plaintiff requests that the Transcript of Testimony be certified and transmitted to the Supreme Court of the United States pursuant to R. S. Ct. 19 (1) for the reason that the statement of the case in defendants' petition for certiorari fails to accurately present a ready and accurate understanding of the points requiring consideration.

DATED: November 8, 1981

LAW OFFICES OF JOSEPH L. COSTELLO

By Joseph L. Costello,
Attorney for plaintiff

CERTIFICATE OF SERVICE

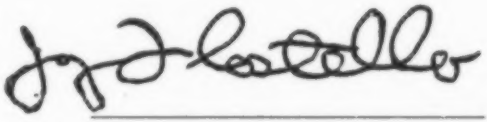
I HEREBY CERTIFY that a copy of the foregoing Request was placed in the mailbox of John F. James in the Office of the Clerk of the Court, District Court, Christiansted, St. Croix, on this 9th day of November, 1981.

_____

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 1981, three (3) copies of Sarauw's Brief in Opposition were addressed to Robert B. White, Jr., counsel for Oceanic and Silver Bulk, Rawle and Henderson, 2200 Packard Building, Philadelphia, PA 19102, John W. Jordon IV, counsel for American, Thomson, Rhodes and Grigsby, 1724 Frick Building, Pittsburgh, PA 15219, Thomas L. Cooper, counsel for Griffith, 808 Grant Building, Pittsburgh, PA 15219, and Charles Sovel, counsel for McCarthy, 800 Lafayette Building, 5th and Chestnut, Philadelphia, PA 19104, and deposited in the United States Post Office, with First Class, postage prepaid. I further certify that all parties required to be served have been served.

November 27, 1981



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